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FCC Record

(cumulative index to Volume 3 included)

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

Dennis R. Patrick, Chairman

James H. Quello

Patricia Diaz Dennis

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Federal Communications Commission Record

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Before the
Federal Communications Commission

In the Matter of

Amendment of Part 0 of
the Commission's Rules to Revise
the Delegations of Authority to
Chief, Private Radio Bureau

ORDER

Adopted: December 2, 1988; Released: December 19, 1988

By the Commission:

1. This *Order* amends the delegations of authority to the Chief, Private Radio Bureau to include the authority to make nonsubstantive changes and minor clarifying and conforming changes to our Rules relating to the private radio services.

2. The delegations of authority to the Chief, Private Radio Bureau are found in §§ 0.331 through 0.337 of the Commission's Rules, 47 C.F.R. §§ 0.331-0.337. Structurally, the delegations of authority are similar to those of the other chiefs of the operating bureaus. Bureau chiefs are permitted to exercise all functions described in the relevant function section of 47 C.F.R. Part 0, Subpart A, except for specified functions that can be performed only by the Commission. The proscribed actions, for the most part, involve matters raising novel questions of law, fact, or policy. Where there is established precedent, however, the bureau chiefs are free to act. By amending the delegations to the Chief, Private Radio Bureau to allow nonsubstantive changes to the Rules as well as minor clarifying and conforming changes to be made without Commission action, the Commission and the Private Radio Bureau will be able to carry out the provisions of the Communications Act more efficiently and effectively.

3. Prior notice and comment procedures are not required because the amendments herein pertain only to internal agency procedures and practices. *See* 5 U.S.C. § 553(b)(A), 47 C.F.R. § 1.412(b)(5).

4. Since a Notice of Proposed Rule Making is not required, the Regulatory Flexibility Act, P.L. 93-354, does not apply.

5. Authority for this action is contained in Sections 4(i), 5(c)(1), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c)(1), and 303(r).

6. In view of the above, IT IS ORDERED that Part 0 of the Commission's Rules IS AMENDED as set forth in the Appendix below.

7. IT IS FURTHER ORDERED that because it deals only with internal Commission practice and procedure this Order is effective upon adoption by the Commission. *See* 5 U.S.C. § 553(d), 47 C.F.R. § 1.427(b).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 0 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 0 continues to read as follows:

AUTHORITY: Sec. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155.

2. Section 0.331 is amended by revising paragraph (a)(1) to read as follows:

§ 0.331 Authority Delegated

(a) * * *

(1) Notices of proposed rule making and of inquiry, final orders in rule making proceedings and inquiry proceedings, and reports arising from any of the foregoing, except such orders involving nonsubstantive revisions to the rules, or orders involving changes clarifying a rule based on established Commission precedent, or conforming one rule within Part 1, Subpart F, and Parts 80 through 97 with another rule, or conforming any of these rules to formally adopted international convention or agreement where novel questions of policy or law are not involved.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

UNC INCORPORATED
UNC HOLDINGS, INC.,
Transferor,

and File No. ENF-88-19

PACIFIC TELECOM, INC.,
Transferee.

Application for Authority to
Transfer Control of TRT
Telecommunications Corporation
and Related Corporate Affiliates

MEMORANDUM OPINION AND ORDER

Adopted: December 8, 1988; Released: December 19, 1988

By the Deputy Chief, Operations, Common Carrier Bureau:

1. Before the Bureau is an application filed September 30, 1988 by UNC Incorporated (UNC), its subsidiary UNC Holdings, Inc. (Holdings) and Pacific Telecom, Inc. (PTI) (the Applicants) pursuant to sections 212, 214 and 310(d) of the Communications Act (the Act), 47 U.S.C. § 212, 214 and 310(d),[1] section 1 of the Submarine Cable Landing Act, 47 U.S.C. § 34,[2] and Parts 1, 62 and 63 of the Commission's rules. [3] The Applicants seek approval to transfer control of TRT Telecommunications Corporation (TRTT) and certain of TRTT's affiliated companies (collectively referred to as TRT) from UNC to PTI.[4] TRT, in turn, holds various Commission authorizations, including Section 214 authorizations, a public coast maritime mobile radio station, common carrier radio licenses, submarine cable landing rights, and an international separate systems satellite authorization.[5] The application also includes requests for approval of interlocking carrier directorates.[6]

I. BACKGROUND

2. UNC is a diversified company engaged, *inter alia*, in various telecommunications businesses. PTI is a diversified telecommunications entity providing international communications services through one of its subsidiaries, FTC Communications, Inc. (FTCC). Currently, UNC, through Holdings, owns approximately 93% of a subsidiary, ICC Communications Corporation (ICC). ICC, in turn, owns 100 percent of TRT Communications, Inc. (TRTC), which is also a holding company. ICC serves exclusively as a holding company for TRTC and its subsidiaries. TRTC, in turn, owns 100 percent of TRTT, a common carrier providing international communications services. The TRT companies collectively hold interests in the various Commission authorizations set forth in paragraph 1 above.

3. The Applicants seek consent for PTI to acquire all of the outstanding stock of ICC pursuant to the terms of an Agreement of Merger among the parties dated September 16, 1988 (the Merger Agreement). Upon implementation of the Merger Agreement, PTI will control all of the TRT companies.

4. The Applicants assert that this transfer of control of TRT to PTI will serve the public interest. According to the parties, PTI's acquisition of TRT will enhance the competitive position of two of the smaller service providers in an already competitive marketplace and will improve efficiency in providing interstate and international telecommunications services. They explain that in 1986, PTI acquired the smallest of the six major international carriers, FTCC, and that TRT is the second smallest international carrier. The parties maintain that "[a]cquisition of TRT by PTI and the combination of resources of FTCC and TRT will significantly enhance the ability of both FTCC and TRT to participate in the international market"[7] by expanding their customer base, strengthening TRT through access to the financial and technological resources of PTI, and benefiting customers through more efficient conduct of FTCC's international operations in combination with those of TRT.

5. Applicants further maintain that these benefits will not diminish competition in the domestic interstate market. PTI currently has, and will continue to have after its acquisition of TRT, a very small share of this market. Furthermore, the proposed transfer of control does not constitute a threat to competition in the international marketplace since the Commission has found that only AT&T and those carriers serving non-contiguous domestic points (*e.g.*, Hawaiian Telephone for Hawaii) are dominant in the IMTS market; there are no dominant carriers in the non-IMTS marketplace.[8] The applicants contend that TRT and FTCC will continue to face direct competition in the provision of IMTS and non-IMTS communications services in the United States and abroad from a growing range of large, well-capitalized competitors including AT&T, Contel ASC, GTE, Comsat, Western Union, MCI and US Sprint. The applicants further note that granting their application would be consistent with the Commission's recent authorizations of similar mergers in the international telecommunications markets.[9]

II. DISCUSSION

6. Upon consideration of the subject application, the underlying Merger Agreement and exhibits attached thereto, we find that the proposed transfer of control of TRT and of TRT licenses and authorizations as set forth in the application will serve the public interest, convenience and necessity. Initially, we must address the issue of whether the proposed transaction will inhibit competition and thereby be detrimental to public interest. Section 7 of the Clayton Act proscribes the acquisition of the stock, other share capital, or assets of a company by another company "where in any line of commerce in any section of the country" the effect of such acquisition may be "substantially to lessen competition, or to tend to create a monopoly."[10] Under Section 11 of that statute this Commission is empowered to enforce Section 7 in the case of "common carriers engaged in wire or radio com-

munications or radio transmissions of energy."[11] The courts have construed this to mean that the requirements of Section 11 of the Clayton Act and the applicable provisions of the Communications Act "are satisfied when the Commission seriously considers the antitrust consequences of a proposal and weighs those consequences with other public interest factors."[12] In other words, we are required to consider anticompetitive consequences as one part of our public interest calculus.[13] Our independent review of the material filed does not reveal, nor do we foresee, any significant threat to competition in the marketplace resulting from the proposed transaction. On the contrary, combining the resources of the two smaller carriers, TRT and FTCC, and strengthening their position should result in enhancing PTI's ability to compete domestically and overseas, and consequently will serve the public interest, convenience and necessity.[14] Therefore, we will grant the subject application. We find nothing in the record of this proceeding which would lead to a contrary conclusion. We also point out that the instant transfer of control and attendant merger involves smaller entities with relatively smaller shares of the relevant market than those involved in previously authorized mergers, *e.g.*, Western Union's merger with ITT Worldcom.[15] or the acquisition of RCA Globcom by MCI.[16]

7. Accordingly, having reviewed the 214 applications and the record in this matter, IT IS CERTIFIED that the present public convenience and necessity will be served by operation of the subject TRT facilities by PTI as proposed in the application.

8. IT IS ORDERED, pursuant to 47 U.S.C. §§ 212, 214(c) and 310(d) of the Act, § 1 of the Submarine Cable Landing License Act of 1921, 47 U.S.C. § 34, Parts 1, 62 and 63 of the Commission's rules, 47 C.F.R. Parts 1, 62 and 63, and authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the application for Authority to Transfer Control of TRT Telecommunications Corporation and related corporate affiliates to PTI IS GRANTED.

9. IT IS FURTHER ORDERED that this Order IS EFFECTIVE upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Operations
Common Carrier Bureau

FOOTNOTES

[1] Section 310(d) provides that no radio construction permit or license shall be transferred without an application to the Commission and its finding that the public interest, convenience and necessity will be served. Section 212 states that it is unlawful for any person to hold the position of officer or director of more than one carrier subject to the Act without Commission authorization. Section 214 provides, in part, that no carrier shall acquire or operate any line or engage in the transmission over such line unless it first obtains from the Commission a certificate that the present or future public convenience and necessity require such construction or operation.

[2] Section 34 requires a written license to land or operate a submarine cable connecting the United States with a foreign country.

[3] 47 CFR Parts 1, 62 and 63 contain, respectively, the Commission's rules regarding practice and procedure, interlocking directorates, and extension of lines and discontinuance of service by carriers.

[4] A public notice on this application was released on October 6, 1988. The proposed transfer is unopposed.

[5] The various authorizations presently held by TRT are specified in Attachments B, D, E, F, G, H and I to the application and in the Letter from David A. Naimon, Counsel for UNC to the Commission (dated November 28, 1988).

[6] To permit PTI and TRT to share directors and officers, the applicants seek approval that the companies listed on Attachment J to the application may be commonly owned by PTI pursuant to Section 212 of the Act and Part 62 of the Commission's Rules.

[7] *See* Application at 12.

[8] International Competitive Carrier Policies, 102 FCC 2d 812 (1985), *reconsideration denied*, 60 RR 2d 1435 (1986). Application of General Electric Company and MCI Communications Corporation, 3 FCC Rcd 2803, 2807-2808 (1988) (Common Carrier Bureau approval of transfer of control of RCA Global Communications, Inc. from General Electric to MCI) (RCA Global Transfer Authorization).

[9] *See, e.g.*, Applications of Western Union Corporation, *et al.*, 2 FCC Rcd 6063 (1987); RCA Global Transfer Authorization, *supra*.

[10] 15 U.S.C. § 18.

[11] 15 U.S.C. § 21.

[12] United States v. FCC, 652 F.2d 72, 88 (D.C. Cir. 1980).

[13] *Id.* at 87, citing Denver and Rio Grande Western Railroad v. United States, 387 U.S. 485 (1967).

[14] We note that pursuant to Executive Order No. 10530 (May 10, 1954), we requested the Department of State's view on whether to approve the transfer of control of TRT's cable landing licenses. The Department of State has indicated it does not object to the transfer, subject to "any conditions upon which the Department of State approved granting the original Cable Landing Licenses, and with the understanding that there are no modifications to any of the cable systems or the U.S. landing points of the systems." Letter from Dean A. Olmstead, Acting Director, Satellite and Cable Policy to George S. Li, the Chief, International Facilities Division (November 18, 1988).

[15] Application of Western Union Corporation, *et al.*, *supra*.

[16] RCA Global Transfer Authorization, supr a, 3 FCC Rcd at 2809.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 19, 1988

GENERAL TELEPHONE OPERATING COMPANIES FILE REVISIONS TO COST ALLOCATION MANUAL PUBLIC COMMENT INVITED

In the *Joint Cost Order*, 2 FCC Rcd 1298 (1987), the Commission required certain telephone companies to file and obtain approval of manuals containing the methods they use to separate the costs of providing regulated telephone service from the costs of nonregulated activities. The General Telephone Operating Companies (GTOCs) filed their manual in 1987 and the Common Carrier Bureau approved the manual on June 6, 1988, conditioned upon the filing of numerous specified revisions. *See General Telephone Operating Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated* Costs, 3 FCC Rcd 3573 (1988). Carriers must submit proposed revisions to their manuals at least 60 days prior to implementation if the revisions change the cost categories or allocation mechanisms, or change the way employee time is allocated.

On December 1, 1988, the GTOCs filed proposed revisions to their cost pools and allocation mechanisms. The GTOCs propose to change the apportionment basis of certain cost pools; to add certain cost pools; and to delete a cost pool.

Comments on the revisions to the GTOCs' manual may be filed no later than **January 11, 1989.** Replies should be filed by **January 23, 1989.** A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N. W., Room 812, Washington, D. C. 20554 and to International Transcription Services, Inc., 2100 M Street, N. W., Washington, D. C. 20036, (202) 857-3800.

Copies of the cost manual revisions may be obtained from International Transcription Services, Inc. Copies are also available for public inspection and copying in Room 812, 2000 L Street, N. W., Washington, D. C. 20554.

For further information contact Alicia Dunnigan at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-528

In the Matter of

AMERITECH OPERATING COMPANIES Tariff F.C.C. No. 2	Transmittal Nos. 206, 220, and 225

ORDER

Adopted: December 2, 1988; Released: December 19, 1988

By the Deputy Chief, Common Carrier Bureau:

1. The Ameritech Operating Companies (Ameritech) on December 2, 1988 filed a request for extension of time in which to submit their direct case in this proceeding. Under the terms of the Bureau's *November 2 Order* [1] suspending the captioned tariff revisions, Ameritech is required to file its direct case no later than December 5, 1988.

2. Ameritech states that information being prepared for the 1989 annual access tariff filing will affect the presentation of its direct case. It therefore asks that the time for filing its direct case be extended to January 15, 1989.

3. As the rates in question are suspended, no party will be prejudiced by the requested extension. Accordingly, Ameritech's request for extension is granted, and its direct case shall be filed no later than **January 15, 1989.** As originally specified in the *November 2 Order*, oppositions to Ameritech's direct case shall be filed no later than 14 days after it is submitted, and replies no later than 14 days after oppositions are filed.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

FOOTNOTE

[1] Ameritech Operating Companies, Memorandum Opinion and Order, CC Docket No. 88-528, DA 88-1750, released Nov. 2, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-528

In the Matter of

AMERITECH OPERATING COMPANIES Tariff F.C.C. No. 2	Transmittal Nos. 206, 220, and 225

ERRATUM

Released: December 19, 1988

1. In the Memorandum Opinion and Order (DA 88-1750) released November 2, 1988, in this proceeding, paragraph 45 hereby is revised to read as follows:

> Accordingly, IT IS ORDERED, pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), that to the extent the rates filed by Ameritech on behalf of Illinois Bell reflect increases attributed to jurisdictional separations changes, as discussed at paragraph 39 of this Order, those rates ARE SUSPENDED until April 3, 1989, five months from the present scheduled effective date.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-554

In the Matter of

Local Exchange Carrier
Access Tariff Rate Levels

ORDER

Adopted: December 9, 1988; Released: December 12, 1988

By the Deputy Chief, Common Carrier Bureau:

1. On December 7, 1988, Contel Corporation (Contel) filed a motion for extension of time[1] on behalf of its telephone operating companies. Contel requests a 3-day extension of time in which to file price revisions pursuant to the Bureau's *Order* [2] in the above-captioned proceeding. It seeks permission to file its revisions on December 15, 1988.

2. Contel asserts that in view of the comprehensive nature of its proposed filing it requires an additional three days beyond the December 12, 1988, date specified in the *Show Cause Order*. Petitioner states that it is in the midst of its heaviest workload of the year, as a result of its annual tariff filing to be made on December 30, 1988, and the proposed filing of its first Carrier Common Line tariff. Therefore, Contel argues, the time permitted for filing by the *Show Cause Order* is too brief a period to allow Contel to comply fully with the Bureau's directive.

3. The Bureau has reviewed Contel's motion and has determined that Contel has shown good cause for a short extension of the December 12 filing date for its proposed tariff revisions. We therefore grant Contel an extension of time until December 15, 1988, to file its proposed tariff revisions. We will also grant parties wishing to file petitions against Contel's delayed tariff filing a similar extension of time.

4. Accordingly, IT IS ORDERED that the motion for extension of time filed by Contel Corporation, IS GRANTED to the extent specified herein.

5. IT IS FURTHER ORDERED that parties wishing to petition against Contel's tariff filing may file petitions no later than December 22, 1988.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief
Common Carrier Bureau

FOOTNOTES

[1] Contel also requested a waiver of Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38. That request will be addressed in a separate action.

[2] Local Exchange Carrier Access Tariff Rate Levels, Order To Show Cause, CC Docket No. 88-554, DA 88-1869, released Dec. 2, 1988 (*Show Cause Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TRT INTERNATIONAL, INCORPORATED — File No. I-T-C-89-012

Application for authority to acquire and operate landline facilities between the U.S. and Mexico for service to points beyond Mexico.

ORDER AND AUTHORIZATION

Adopted: December 12, 1988; Released: December 19, 1988

By the Chief, International Facilities Division:

1. The above-captioned application, filed on October 20, 1988, by TRT International, Incorporated (TRTI), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate landline facilities between the United States and Mexico border connecting with landline facilities and transiting services in Mexico for the provision of switched voice services between the U.S. and Central American points. TRTI has been authorized to provide resale services between the U.S. and the Central American points that will be served under this application. TRTI states that grant of the instant application will allow it to provide end-to-end service between the U.S. and Central American locations, offering customers an alternative routing. The application was placed on public notice on October 26, 1988. No comments were received. Upon consideration of the application, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C- 89-012 IS GRANTED, and TRTI is authorized to:

a. lease and operate one T-1 channel multiplexed to provide 24 voice-grade circuits between TRTI's New York office and San Antonio, Texas and connecting facilities within San Antonio to Telefonos de Mexico's (Telmex) facilities at the U.S./Mexican border; and

b. use said facilities in connection with matching landline facilitites and international telephone transiting services to be provided in Mexico by Telmex for the provision by TRTI of international switched voice services between the U.S. and overseas points reached via Mexico.

3. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between TRTI and its correspondents in Mexico and Central America, and copies of the agreements shall be filed with the Commission within 30 days of its execution.

4. This authorization is effective on its release date and shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

5. IT IS FURTHER ORDERED that TRTI shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61 (October 1, 1987).

6. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities
Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORPORATION — File No. I-T-C-89-016

Application for authority to acquire and operate facilities for service between the U.S. and India and beyond.

ORDER AUTHORIZATION AND CERTIFICATE

Adopted: December 12, 1988; Released: December 19, 1988

By the Chief, International Facilities Division:

1. The above-captioned application, filed on October 27, 1988 by MCI Telecommunications Corporation (MCI), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate satellite and connecting facilities for direct service between the U.S. and India and beyond. The application was placed on public notice on November 2, 1988. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service to India by MCI.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-89-016 IS GRANTED, and MCI is authorized to:

a. lease from Comsat and operate five voice-grade satellite half-circuits between MCI's Yacolt, WA earth station and an appropriate satellite over the Pacific Ocean, connecting with similar circuits between the satellite and an earth station in India, furnished by MCI's correspondent in India;

b. own and operate five voice-grade circuits in the Yacolt earth station;

c. own and operate five voice-grade connecting circuits between the Yacolt earth station and MCI's Dominguez Hills, California operating center; and

d. use said facilities to provide MCI's regularly authorized services, including switched voice-grade service, between the U.S. and India and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to insure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between MCI and its correspondent in India, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. This authorization is effective on its release date and shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

6. IT IS FURTHER ORDERED that the MCI shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61 (October 1, 1987).

7. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORPORATION — File No. I-T-C-89-005

Application for authority to acquire and operate facilities for service between the U.S. and Turkey.

Application for authority to acquire and operate facilities for service between the U.S. and Kuwait. — File No. I-T-C-89-006

ORDER AUTHORIZATION AND CERTIFICATE

Adopted: December 12, 1988; Released: December 19, 1988

By the Chief, International Facilities Division:

1. The above-captioned applications, filed on October 19 and 20, 1988 respectively, by MCI Telecommunications Corporation (MCI), request authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate satellite and connecting facilities for direct service between the U.S., on the one hand, and Turkey and Kuwait on the other hand, and beyond. The applications were placed on public notice on October 26, 1988. No comments were received. Upon consideration of the applications, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct services to Turkey and Kuwait by MCI.

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-89-005 and I-T-C-89-006 ARE GRANTED, and MCI is authorized to:

a. lease from Comsat and operate 32 voice-grade satellite half-circuits between an appropriate earth station on the east coast of North America and an appropriate satellite over the Atlantic Ocean;

b. lease from AT&T and operate 32 voice-grade circuits in the east coast earth station;

c. lease and operate 32 voice-grade circuits between the east coast earth station and MCI's West Orange, NJ operating center; and

d. use said facilities to provide MCI's regularly authorized services, including switched voice service, between the U.S. and Turkey (24 voice-grade circuits), and Kuwait (eight voice-grade circuits), and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to insure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between MCI and its correspondents in Turkey and Kuwait, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

5. This authorization is effective on its release date and shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

6. IT IS FURTHER ORDERED that MCI shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61 (October 1, 1987).

7. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southern New England Telephone Revisions to Tariff F.C.C. No. 34 — Transmittal No. 441

ORDER

Adopted: December 9, 1988; Released: December 14, 1988

By the Deputy Chief, Common Carrier Bureau:

1. On September 16, 1988, Southern New England Telephone Company (SNET) filed the captioned tariff revisions, which are scheduled to become effective on December 15, 1988. The captioned filing would increase SNET's rates for Local Switching by 7.9 percent and would increase the average rate for a premium switched access minute of use by less than 5 percent. SNET contends that the proposed rate increase is necessary due to inadequate earnings for the Local Switching category which, it asserts, result from cost allocations to the interstate access elements which have exceeded prior estimates. Letter of Transmittal at 1. In addition, SNET states that demand for switched access has been below the levels that it forecast in its Annual 1988 Access Tariff Filing. Description and Justification (D&J) at 1-1.

2. On October 3, 1988, MCI Telecommunications Corporation (MCI) filed a petition to reject, or, in the alternative, suspend and investigate the captioned tariff revisions. MCI argues that SNET has failed to support its claims that demand for switched access service has been lower than anticipated. MCI Petition at 2-7. In addition, MCI contends that the increased cost allocations to the Local Switching element that SNET has reported are the result of what MCI regards as questionable cost accounting on the part of SNET. *Id.* at 7-12.

3. In response, SNET argues that it supported its demand results with reasonable explanations and with detailed and accurate data. SNET states that confidential data contained in its Carrier Access Billing System database demonstrate that its analysis of the reasons for its demand shortfall is accurate. SNET Reply at 4-11. In addition, SNET argues that its procedures for rate development are in full compliance with the Commission's Rules. SNET states that the cost projections used in this filing are based on actual results for the first six months of 1988. SNET explains that the variances in cost allocations to Local Switching are the result of increased costs in accounts that have a higher percentage allocation to this element and decreased costs in accounts that have little or no allocation to the Local Switching element. *Id.* at 11-18.

4. The Common Carrier Bureau has reviewed the tariff transmittal and the pleadings filed by MCI and SNET[1] as well as further information submitted by SNET in response to informal staff requests.[2] We find that no compelling argument has been presented that the transmittal is patently unlawful so as to require rejection or that investigation of the revisions is warranted at this time.

5. Accordingly, IT IS ORDERED that the petition against Southern New England Telephone Tariff F.C.C. No. 34, Transmittal No. 441, filed by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] Our decision to deny this petition should not be construed as endorsing SNET's unchallenged assertion that certain of its data contained in the Carrier Access Billing System database warrant confidential treatment.

[2] *See* Letter from J.B. Rooney, District Staff Manager, Regulatory Matters, SNET, to C. Frentrup, Tariff Division, Common Carrier Bureau, FCC, Nov. 22, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-268,
Phase II

In the Matter of

COMMUNICATIONS SATELLITE CORPORATION Tariff No. 101 Implementing Second Memorandum Opinion and Order in CC Docket No. 80-634	Transmittal Nos. 507 and 510
Tariff F.C.C. Nos. 101 and 14 Implementing Reconsideration Order in CC Docket No. 80-634 and Report and Order in CC Docket No. 82-540	Transmittal No. 546
Tariff F.C.C. No. 103, Establishing Separate, Unbundled Space Segment Offering	Transmittal No. 565

MEMORANDUM OPINION AND ORDER

Adopted: December 5, 1988; Released: December 8, 1988

By the Commission:

I. INTRODUCTION

1. This Order resolves the outstanding cost allocation and rate development issues designated for investigation in CC Docket No. 85-268, arising from Communications Satellite Corporation (Comsat) Transmittal Nos. 546 and 565.[1] Other issues relating to those transmittals were resolved in April 1987.[2] This Commission's related investigation of Comsat's Tariff Transmittal Nos. 507 and 510,[3] initiated under CC Docket No. 80-634 and subsequently consolidated with CC Docket No. 85-268, is also resolved by this Order. As these proceedings were initiated under circumstances sharply different from the present circumstances, and this bears on our resolution of certain of the outstanding issues, a short summary of this proceeding's history is presented in Section II, *infra*.

2. This Order concludes the investigation as to all issues remaining from the initial designation of issues. We determine that Comsat has achieved a reasonable allocation of space and earth segment costs by first allocating costs that were directly assignable, and then allocating remaining costs in proportion to the assignable costs. We find that the tentative disallowance of Comsat's working capital allocation was unwarranted. We conclude that Comsat's allocation of jurisdictional research and development (R&D) expenses to a common pool was reasonable. We also conclude that Comsat has adequately explained its allocations of the Network Management Action System costs.

3. This Order also finds that Comsat's R&D benefits all customers, and that there is no basis to require Comsat to take account of each component of its R&D not used by a particular customer. We terminate our investigation of Issues A7 and A8, which relate to television service rates, without making a determination on the merits because the questions have become moot. Finally, we terminate the investigation of Comsat's use of an equivalency methodology to formulate rates for new services because no circuits were leased during the relevant period.

II. BACKGROUND

4. In our 1980 *Comsat Study* [4] this Commission determined that the Communications Satellite Act of 1962, 47 U.S.C. §§ 701, *et seq.*, permits Comsat to engage in activities not mandated by that statute, so long as these activities were not inconsistent with Comsat's explicit statutory mission. Comsat's involvement in these additional activities, which are traditionally described as "non-jurisdictional" activities, however, inherently raised concerns respecting (1) conflicts of interest from Comsat's simultaneous involvement in jurisdictional and non-jurisdictional activities; (2) Comsat's potential competitive advantage in non-jurisdictional activities (flowing from its status as United States signatory to Intelsat and Inmarsat); and (3) the misallocation of costs for competitive advantage to jurisdictional from non-jurisdictional activities. This Commission also concluded in the *Comsat Study* that changes were required in Comsat's corporate structure, its accounting system, and the arrangements for regulatory oversight of its activities. In response, Comsat initiated a number of organizational changes. At the same time, this Commission in 1980 initiated CC Docket No. 80-634, the Comsat structure proceeding, to determine what measures were necessary to assuage our concerns, specifically whether Comsat's voluntary restructuring was adequate to satisfy our concerns, and whether it was necessary to impose other requirements to address these concerns.

5. In the *First Structure Order*, released in 1982, we determined that Comsat's efforts fell short of satisfying the concerns articulated in the *Comsat Study*, and we accordingly required additional changes.[5] After further comments and staff review, this Commission in 1984 again reviewed Comsat's organizational structure and cost allocation practices, and in the *Second Structure Order* [6] specified new procedures for allocating shared capital costs and expenses between Comsat's jurisdictional and non-jurisdictional activities. To forestall the prospect that jurisdictional ratepayers might be burdened with part of the costs for Comsat's non-jurisdictional activities, we required Comsat to implement revised cost allocation practices adequate to reflect its altered business emphasis.[7] The *Second Structure Order* determined, among other things, that Comsat should be required to replace allocation formulas premised on property or revenues with a cash expenses formula. This Commission observed that a cash expenses formula would better reflect the heavy R&D support necessary for fledgling competitive enterprises to gain a market position.[8] With respect to shared capital costs, the *Second Structure Order* generally required Comsat to replace allocation formulas that were arbitrarily

based on fixed percentages with formulas that more accurately track the actual use of the underlying capital assets. The *Second Structure Order* anticipated that implementation of these accounting and cost allocation procedures would reduce Comsat's jurisdictional rate base and expenses, resulting in a lower revenue requirement for jurisdictional activities.

6. In June 1984, Comsat filed Transmittal Nos. 507 and 510[9] to reflect the accounting and cost allocation changes mandated by this Commission in the *Second Structure Order*. The Common Carrier Bureau (Bureau) instituted an investigation into the level of the rates in Transmittal Nos. 507 and 510 and the methodology employed to develop those rates, but did not designate issues. Subsequently, this Commission's reconsideration of the *Second Structure Order* modified some of the cost allocation requirements[10] and determined, among other things, that Comsat's rates submitted in Transmittal Nos. 507 and 510 had been improperly targeted.[11]

7. Comsat accordingly submitted Transmittal No. 546,[12] which became effective on March 18, 1985, both to implement changes in its cost allocation formulas to reflect the *Second Structure Reconsideration*, and to retarget its rate of return at 11.48 percent in accordance with that decision. Transmittal No. 546 also implemented portions of the *Earth Station Ownership Order*, which required Comsat to transfer to a separate subsidiary all ownership interests in authorized international earth stations operating with the Intelsat system, and to file separate, unbundled, cost-based rates for the Intelsat space segment and earth station services.[13] Comsat asserted in the support materials for Transmittal No. 546 that approximately 62 percent of its total revenue requirement for the space and earth activities recovered space segment costs and approximately 38 percent of the total recovered earth segment costs.[14]

8. In Transmittal No. 565, which became effective on November 1, 1985, Comsat again decreased the overall rates for space segment service, by 3.97 percent, but revised the rate structure as well, purportedly to align individual rates with costs.[15] Comsat asserted that the rates for each service were adjusted to reflect relative changes in in-house costs[16] and Intelsat ownership costs.[17] This adjustment produced a rate increase in a few instances, including rates for occasional television service. The transmittal also set rates for new services: Datanet, non-preemptible video, and non-primary, non-major path occasional use television.

9. On November 8, 1985, the Bureau designated for investigation certain rate-related issues arising from Transmittal Nos. 546 and 565.[18] The *Designation Order* in the instant proceeding deferred designation of any issues related to Transmittal Nos. 507 and 510 until this Commission completed the investigation of the more recent tariff revisions set for investigation in CC Docket No. 85-268. The *Designation Order* directed Comsat to provide cost of service studies for its recent operations. Review of these studies (Designated Issues D1 and D2) confirmed and detailed past Commission observations, including statements made in connection with certain of the captioned transmittals,[19] that Comsat had consistently earned profits well in excess of its authorized return. Accordingly, the Bureau in the *April 1987 Order* tentatively determined the extent of Comsat's over-earnings and required Comsat to refund this excess. The Bureau cast this finding, and its proposed resolution of two of the designated issues, in the form of an Order To Show Cause why the Bureau's conclusions should not be implemented.[20]

10. The Bureau's *April 1987 Order* resolved some of the designated issues and continued the investigation of others.[21] For example, the Bureau concluded that the allocation of Comsat Labs costs between the space and earth segments was not unreasonable, and that Comsat had justified the difference between the Comsat Labs costs specified in Transmittal Nos. 546 and 565. *See April 1987 Order*, 2 FCC Rcd at 3710 (Designated Issue A2). The Bureau further concluded that Comsat's method of allocating corporate capital to the space segment in-house costs was reasonable. *Id.* at 3712 (Designated Issue A8). The Bureau decided, however, that further investigation was warranted to examine Comsat's method of allocating corporate *expenses* and Comsat's method for rounding its costs upward.

11. The *April 1987 Order* also resolved the issue regarding Comsat's tax expenses. *Id.* at 3713 (Designated Issue C1). The Bureau found Comsat's cost of service study for the World Systems Division to be adequate, and accepted its revised study as a basis for calculating the refunds of revenues associated with earnings in excess of the authorized return. *Id.* (Designated Issue D1). The Bureau concluded that it was not worthwhile to commit further Commission and carrier resources to pursue the space and earth breakdown of that study. *Id.* at 3713-14 (Designated Issue D2). The Bureau also completed the investigation of several issues relating to Comsat's demand estimates, stating that Comsat's actual demand experience indicated that these estimates were not unreasonable. *Id.* at 3714 (Designated Issues E1, E2, and E3). Finally, the Bureau found that Comsat had adequately explained its allocations to multipurpose earth stations. *Id.* at 3715-16 (Designated Issue F1).

12. While, as noted, the Bureau's initial decision left several cost allocation and rate development issues specified by the *Designation Order* unresolved, during the period after the *April 1987 Order* the fundamental Commission concerns that prompted the detailed inquiry begun by the *Designation Order* were being sharply diminished, as to future operations, by Comsat's apparent determination to curtail its non-jurisdictional activities. Comsat in several instances prior to the *April 1987 Order* had disengaged from the type of non-jurisdictional activities that originally led to the cost allocation procedures required by the *Second Structure Order* and the tariff revisions implementing them. Thus, for example, Comsat had disposed of its interest in Satellite Business Systems in 1986, and withdrew from the direct broadcast satellite (DBS) enterprise in 1984. Comsat recognized pretax charges related to DBS of2.5 million in 1984 and120 million in 1985.[22] Of more material interest in the present context is Comsat International's eventual divestment of earth station ownership.

13. During 1987 Comsat withdrew from the more prominent non-jurisdictional activities that had originally prompted this Commission's concerns regarding Comsat's structure. For example, in August 1987, Comsat sold its 50 percent ownership interest in the Brewster, Washington earth station to U.S. Electromagnetics, Inc. for125.000.[23] In December 1987, it sold its 50 percent interest in earth stations at Etam, West Virginia, Roaring Creek, Pennsylvania, and Jamesburg, California to AT&T for approximately50.4 million. *Id.* Comsat also entered

into agreements to sell its 50 percent interests in earth stations at Andover, Maine, Pulantat, Guam, and Lenox, West Virginia.[24] By the end of 1987, Comsat had also transferred its Comsat International Communications, Inc. (CICI) and very small aperture terminal (VSAT) manufacturing enterprises to Contel ASC.[25]

14. While this shift in Comsat's corporate strategy was voluntary, and reversible at management's discretion, during the same period Congress had conducted hearings to consider, among other things, the operation of the 1962 Communications Satellite Act and in particular the tension between Comsat's private and public interests.[26] Thus a sudden redirection of Comsat's energies toward non-jurisdictional activities appears to be improbable.

15. The change in Comsat's operations is a relevant factor in determining whether Comsat's cost allocation procedures are sufficiently precise to produce just and reasonable rates. An allocation method that we might accept or even prescribe for some costs or some carriers may not be acceptable for other costs of other carriers. An allocation method that might be unacceptable at a particular time may be sufficient at a later time in view of changed circumstances. The impact upon ratepayers or competing carriers is a relevant factor in evaluating any allocation method. The potential impact of an imprecise allocation upon customers of Comsat's jurisdictional services has clearly diminished since the *Second Structure Order* was adopted. Some of the allocation questions this investigation was initiated to resolve no longer have any prospective significance.[27]

16. Allocation procedures that are reasonable under present and future circumstances could, of course, have been unreasonable in prior periods and arguably could warrant refunds under some circumstances. Inasmuch as Comsat apparently supplied its space and earth services to the same customers, possible misallocations between those services did not affect the total payments of those customers. This factor also warrants consideration in evaluating the reasonableness of Comsat's allocation methods.

17. We now turn to the specific remaining issues from the *Designation Order*. We begin our discussion with Comsat Transmittal Nos. 546 and 565, and then discuss Transmittal Nos. 507 and 510.

III. DISCUSSION

A. *Allocation of space and earth segment costs*

18. Issue A1 of the *Designation Order* required Comsat to explain and justify the allocation, in Transmittal No. 546, of 62 percent of total service costs to the space segment and 38 percent to the earth segment. That Order also directed Comsat to provide the basis for this apportionment, and to justify any deviation from this percentage split.[28]

1. *Pleadings*

19. In its response, filed in January 1986 pursuant to the *Designation Order*, Comsat states that the overwhelming majority of the costs for space and earth segments were unequivocally and exclusively related to the space segment.[29] Comsat explains that the split of 62 percent and 38 percent is the overall result of separate analyses of earth segment and space segment costs.[30] According to Comsat, approximately 94.9 percent of capital costs and 80.9 percent of expenses for the World Systems Division were directly assigned to either the space or earth segment. Comsat Response at 3-4. Comsat asserts that it found the remaining revenue requirement of23.2 million to be "common" to earth and space segments and allocated it consistently with the *Second Structure Order*. *Id.* at 4.

20. Some of the commenters who filed against the Transmittals also filed pleadings after the *Designation Order*. Fedex International Transmission Corp., (Fedex), FTCC McDonnell Douglas International Telecommunications Co. (FTCC), MCI International, Inc. (MCII), and TRT Telecommunications Corp. (TRT) submit an analysis prepared by A. J. Chisholm which addresses Comsat's revenue requirements for its regulated services.[31] Chisholm expressed concern during the initial phase of this proceeding that Comsat may be subsidizing its competitive activities in the rates for its monopoly services. Chisholm Analysis at 4-5. He asserts that Comsat includes in its monopoly rates a charge for its over-subscription to Intelsat. *Id.* at 55. FTCC and TRT submit that Comsat's oversubscription to Intelsat provides no benefit to U.S. jurisdictional ratepayers, and argue that Comsat's space segment rates should be set using the Intelsat Utilization Charge.[32] SIN, Inc. also expresses concern regarding Comsat's oversubscription to Intelsat.[33] Christopher J. Pleatsikas (Pleatsikas) argues that Comsat may be subsidizing its competitive ground segment in its rates for monopoly space segment.[34]

2. *Discussion and conclusion*

21. The *Designation Order* was designed to examine the possibility that Comsat had overallocated costs to the monopoly jurisdictional space segment to subsidize the competitive non-jurisdictional earth station offerings. *Designation Order* at para. 34. In Transmittal Nos. 546, Comsat allocated 62 percent of its costs to the space segment and 38 percent to the earth segment, and derived rates accordingly. On the basis of Comsat's filings, the Bureau could not determine whether this allocation was justified and whether the rates derived were reasonable. The Bureau was concerned about Comsat's apportionment of costs between the space and earth segments because it appeared purely arbitrary and Comsat supplied no information in its Description and Justification accompanying the tariff transmittals to justify the allocation.

22. As noted, Comsat's workpapers assert that all but39.6 million of its 241 million 1985 revenue requirement, or 16.4 percent, was directly assigned to space or earth segment operations, in conformance with the *Second Structure Order*, and that its allocation of the remainder of costs also comports with that Order.[35] Comsat also states that space and earth services were invariably provided together during the period before December 31, 1986 for all services except IBSS.[36] Comsat contends that under these circumstances it makes little difference how the space and earth costs are apportioned between the two categories since the majority of customers paid for space and earth services together.[37]

23. As to the directly assigned costs, further review of the record has satisfied us that Comsat has generally followed the allocation method adopted by this Commission in CC Docket No. 86-111,[38] though it was not subject to the terms of that decision. Comsat first assigned costs that were directly assignable, and then allocated remaining costs in proportion to the directly assignable costs.

Comsat states that approximately 90 percent of the revenue requirement was directly assigned to either the space segment or the earth segment. The impact of any alleged misallocation on the customers' total rate, therefore, is insignificant. It also appears that Comsat allocated the remainder of common costs consistently with the procedures established in CC Docket No. 86-111. Comsat's decision to employ procedures that we subsequently adopted for an analogous purpose clearly falls within the acceptable range of carrier discretion.

24. Our review of the record since the *April 1987 Order* has not disclosed instances of misallocation in the direct assignment of costs as part of the space and earth cost division.[39] Moreover, the record before us does not demonstrate any specific instances of the misallocation complained of by petitioners. Further, we find no significant support for the contentions that the practices followed in these allocations resulted in unreasonable rates. Comsat stresses that space and earth services were invariably provided together during the period before December 31, 1986. Comsat contends that under these circumstances it makes little difference how the space and earth segment costs are apportioned between the two categories since the majority of customers paid for space and earth services together. Hence, we find the space and earth allocations sufficiently justified in light of the circumstances.

25. As stated in the background discussion in Section II, *supra*, any prospective benefits from a revised allocation method have been greatly diminished by Comsat's disengagement from non-jurisdictional activities. Further, while the alleged disproportionate allocation of costs to the space segment might have influenced customer decisions respecting earth station service during the period under review, Comsat had decided to terminate the largest portion of its earth station operations in mid-1985, prior to the *Designation Order*, so any competitive advantage was destined to be short-lived.

26. In sum, we believe that the carrier's general compliance with the methods of CC Docket No. 86-111 is sufficient to withstand the general challenges leveled against it, particularly as the portion of costs allocated rather than directly assigned is modest. The impact of any alleged misallocation on the customers' total rates, therefore, is insignificant. Moreover, we conclude, based on the record before us, that the practices followed in these allocations did not result in unreasonable rates. Given the comparatively modest percentage of the overall revenue requirement allocated by indirect methods and the limited effect that even significant misallocations would have on rates,[40] we conclude that the space/earth allocation methods were sufficient.

B. ***Working capital***

27. Issue A3 of the *Designation Order* directed Comsat to justify the jurisdictional amount of working capital allocated to the space segment under Transmittal Nos. 546 and 565, and to explain any differences between the amounts in these two transmittals.

28. Comsat argues, in its response to this Commission's show cause Order contained in the *April 1987 Order*, that undertaking an adequate working capital study would entail substantial and disproportionate time and expense.[41] It states that the bases for the Bureau's tentative disallowance, that Comsat has significant amounts of zero-cost capital available, and that Comsat's alternative sources of zero-cost funds exceed the working capital allowance, are erroneous. *Id.* at 37. Comsat notes that the two largest items the Bureau deemed as "free" cash on hand - deferred FIT (31,532,000) and deferred ITC (35,420,000) - appear as credits to, *i.e.*, deductions from, the rate base. Further, it states that current assets (17,757,000) consist of receivables and prepayments to Intelsat. It asserts that these sources are either funds that Comsat will receive when its customers eventually pay their bills or funds already spent for a benefit that will eventually be received. *Id.* at 37-38.[42]

29. The Bureau, in the *April 1987 Order*, tentatively disallowed Comsat's claimed working capital for its space segment operations, 2 FCC Rcd at 3717, and ordered Comsat to recalculate the rates proposed in Transmittal Nos. 546 and 565 using actual demand figures for the period during which the rates were in effect. *Id.* at 3710.[43] The Bureau later deferred that requirement pending consideration of Comsat's response to the show cause requirement contained in the *April 1987 Order*.

30. This Commission in its *Rate Base Order*,[44] found that a properly developed lead-lag study is the most accurate method for determining a cash working capital allowance. Although it has been a number of years since Comsat has conducted a cash working capital study[45], we nevertheless agree with Comsat that the study on which it relied for this proceeding is the best information available on Comsat's cash working capital requirement. We conclude that the amounts shown in its study (2.6 million) are based on a reasonable methodology and therefore should not be disallowed. Accordingly, we find that the tentative disallowance was unwarranted.

C. ***R & D expenses in a common pool***

31. Issue A4 of the *Designation Order* asked Comsat to explain its allocation of jurisdictional R&D expense to a common pool, to the extent this expense was not directly assigned according to individual projects or organizational units. Comsat states that the pooled R&D projects will advance the state of the art of satellite technology for multiple applications including jurisdictional services.[46] In earlier pleadings, Comsat asserts that jurisdictional R&D expenses are not allocated to the pooled category, but that part of the pooled category is allocated to jurisdictional revenue requirements.[47] It explains that the pooled R&D category consists of the basic research projects initiated and managed entirely by the Comsat Labs. Comsat Response [85-268] at 7. Comsat notes that it has allocated the costs of these projects on the basis of the gross operating expenses of the various organizational units within the company, in compliance with the methodology developed in the *Second Structure* proceeding. *Id.* It observes that using this formula results in the jurisdictional ratepayers contributing less than one of every three dollars of funding for the pooled R&D projects. *Id.* at 8. Comsat's pooled R&D totaled 2.2 million.[48] We believe Comsat's explanation is sufficient in view of all of the circumstances.

D. ***Network Management Action System capital costs***

32. Issue A5 asked Comsat to justify allocating over 50 percent of Network Management Action System (NMAS) capital in Transmittal No. 546 to the space segment.[49]

33. Comsat states that when it filed Transmittal No. 546, it was in the process of forming its earth station subsidiary, Comsat International Communications, Inc. (CICI),

and transferring assets to the subsidiary, and that thus the costs of separate space and earth segment operations were not known. Comsat July 22 Letter, Att. 2 at 2. Comsat explains that it directly assigned costs to the extent possible; the majority, 3.214 million, was for earth station monitoring and equipment located at the earth stations, and thus it was directly assigned to the earth segment. *Id.* at 3.

34. Comsat asserts that it relied on the expertise and judgment of senior management when determining the remainder of the allocations because the costs were not clearly assignable. It claims that management decided that it would be less expensive for the space and earth enterprises to share the hardware, while maintaining separate data bases, rather than build a separate NMAS for the space segment.[50] Comsat states that discussions with NMAS project managers indicated that certain portions of the system would be used on the basis of a 65 percent allocation to space and a 35 percent allocation to earth, and that another portion would be used on the basis of a 50 percent split between space and earth. Comsat July 22 1987 Letter, Att. 2 at 3. It allocated any remaining costs using a percentage split of 19 percent to space and 81 percent to earth, based on a ratio computed according to amounts directly allocated. *Id.* Total costs assigned and allocated to the space segment by all percentages was 1.474 million and total allocated to earth was 6.161 million, according to Comsat's supporting figures. *Id.* at Table 1.

35. Comsat filed Transmittal No. 565 establishing new space segment rates, and CICI's Transmittal No. 1, establishing new earth segment rates after CICI was formed. Comsat states that its management determined that since only the multipurpose earth station traffic was involved, the shared portion of the NMAS system would be used equally by the space and earth segments, and another portion would be shared on a percentage basis of 65 percent to space and 35 percent to earth.[51] Comsat observes that these transmittals related to a new planning period during which a substantial piece of the NMAS system was transferred from property under construction to property in service. *Id.* It shows allocated totals as 3.198 million for space segment and6.872 million for earth segment, with 3.198 million attributable to the shared portion. *Id.* at Table 1. Comsat claims that during the rate period in question, the customers using Comsat's space segment are the same customers using its earth segment, and that any change in the allocation of NMAS would not change the total cost to the customers.[52]

36. Comsat states in its response that its NMAS allocation includes 100,000 of dedicated word processing equipment, so that its allocation minimally exceeds the allocation to the earth segment.[53] The Bureau disallowed Comsat's allocation of NMAS capital costs to its space segment to the extent that it exceeded 19 percent, but deferred that disallowance pending further review of Comsat's submissions.[54]

37. The Bureau designated this issue for investigation because it was concerned with Comsat's increased space segment allocation for NMAS costs. In Transmittal No. 546, Comsat allocated NMAS costs using varying percentages ranging from 65 percent to space and 35 percent to earth to 19 percent to space and 81 percent to earth. By contrast, in Transmittal 565, Comsat allocated NMAS costs using a percentage split of 50 percent to space and 50 percent to earth.[55] The *April 1987 Order* also required Comsat to recalculate the rates proposed in Transmittal No. 565 using the previous allocation ratio of 19 percent and 81 percent that it used in Transmittal No. 546. Comsat has complied with that request, and states that reallocating costs using the 19 percent and 81 percent ratio results in a difference of169,000 in the space segment rate base.[56] It observes that disallowing all NMAS space costs above 19 percent for the 14 months from the effective date of Transmittal No. 565 would result in a total impact of638,600, including interest. Comsat July 22 Letter at 5, and Att. 2.

38. Upon review of Comsat's justification submitted subsequent to the *April 1987 Order*, we conclude that Comsat has adequately explained its allocations related to NMAS. Comsat's percentage allocation of 50 percent to space and to earth was based on the carrier's best business judgment when it had not yet accumulated operating experience. We conclude that Comsat had a sufficient basis for this allocation in view of all the circumstances. We therefore reverse the tentative disallowance of the percentage allocation used in Transmittal No. 565.

E. ***Directed jurisdictional R & D***

39. Issue A6 of the *Designation Order* asked Comsat: (1) to define directed jurisdictional R&D; (2) to describe the R&D that has been included in the jurisdictional revenue requirement in light of this Commission's directive, in the *Second Structure Order*, that Comsat exclude from its jurisdictional rate base all Intelsat- and Inmarsat-related contract R&D; and (3) to specify what R&D work is included, for whom it is performed, and how it differs from that required to be excluded. In its supplemental response, Comsat states that commenters misinterpreted the term "directed," and that it separated out of general "jurisdictional" R&D the costs for R&D requested by Inmarsat and Intelsat, as required by the *Second Structure Order*.[57]

40. RCA asserts that, in Transmittal No. 546, Comsat improperly included9.9 million of "directed R&D" in violation of the *Second Structure Reconsideration*.[58] Pleatsikas objects to Comsat's inclusion, in Transmittal No. 565, of7 million in "directed jurisdictional R&D" which is expressly prohibited by the *Second Structure Reconsideration*.[59] Comsat responds that it removed all R&D associated with Intelsat contracts from its revenue requirement as required by the *Second Structure Reconsideration*.[60] Comsat explains that the directed R&D it included in its revenue requirement represented costs for R&D undertaken at the request of Comsat's Space Communications Division, not at Intelsat's request. *Id.* Comsat further asserts that the cost of a directed R&D project is directly assigned to the line of business for which the work is done.[61]

41. In Transmittal No. 546, directed R&D totaled9.9 million. Of this amount, Comsat allocated6.6 million to the space segment and 3.3 million to the earth segment.[62] We have examined the record and conclude that this allocation is reasonable. We recognize that Comsat's R&D benefits all customers in general and, thus, we can find no basis in the record of this proceeding to require Comsat to take account of each component of its R&D costs that a particular customer may not use. We note that this is consistent with this Commission's *Second Structure Order* which states that despite the maturation of Intelsat, Comsat retains a right to engage in a reasonable amount of R&D related to its jurisdictional mission.[63] We determine

that the present methodology of allocating R&D costs to the account which benefits from the R&D is sufficient to safeguard the interests of the public.

F. ***Cost allocations for television services***

42. We discuss issues A7, A8, and B1 of the *Designation Order* together because these issues arise from various claims made by users of Comsat's television space segment services. Issue A7 directed Comsat to justify the allocation of 14.61 percent of home office G&A and R&D expenses to occasional television service and 3.05 percent of those expenses to full period television service. Issue A8 directed Comsat to justify the allocation of in-house costs, such as corporate capital and corporate expenses, to television services, and to explain why it rounded its revenue requirement for television service upward. Issue B1 directed Comsat to explain the equivalency ratio it used to derive rates for Intelsat Business Satellite Service (IBSS), television services and Datanet[64] using voice grade circuit costs.

1. ***Pleadings***

43. With respect to Issue A7, Univision, formerly SIN, Inc., (Univision) argues that Comsat's allocation of costs between unbundled earth and space segment rates is arbitrary and not cost-based.[65] Capital Cities/ABC, Inc., CBS, Inc., and NBC, Inc. (the Networks) argue that the Intelsat ownership costs and the in-house costs are unreasonably excessive.[66] With respect to Issue A8, Turner contends that Comsat should require its employees to record their time spent on functions for the various Comsat activities. [67] Turner further challenges Comsat's practice of rounding its monthly full period television costs from 7,927 to 8,000. Turner Reply [85-268] at 15.

44. Issue B1 arises because Comsat allocates costs to the Intelsat component of television circuit rates based on the equivalent number of voice grade circuits that a television circuit would provide times the Intelsat rate per voice grade circuit.[68] The Networks claim that this method charges television customers more than those customers would be charged if the equivalent number of circuits had reflected actual Intelsat system use.[69] Pleatsikas objects to Comsat's alignment methodology by which it used an "equivalency factor" to develop IBSS rates from voice grade costs, and maintain that cost-based IBSS charges could be derived from the Intelsat Utilization Charge (IUC).[70] Turner suggests an alternative approach for determining rates for television services by which Comsat would add charges for taxes, in-house costs, and rate of return to the Intelsat IUC.[71] Finally, Equatorial Communications Services (Equatorial) argues that the methodology Comsat used to compute the in-house cost component for Datanet rates, *i. e.*, using television costs as a proxy for Datanet costs, produces inflated and unreasonable rates.[72]

45. Comsat argues that the differences in space segment charges for various services are proper because based on differences in the Intelsat cost assignments for these services.[73] In Transmittal No. 565, Comsat explains its cost allocations as follows: Comsat estimates net corporate capital to be 17 million during the period from July 1985 to June 1986. Comsat allocated to full-time television 2.81 percent of corporate capital and 3.05 percent of expenses, and to occasional television 3 percent of corporate capital and 14.61 percent of expenses.[74] Comsat states that it based its allocation of 14.61 percent of its corporate expenses (such as R&D and home office G&A) to occasional television service and 3.05 percent of those expenses to full-time television service on a survey. Comsat further states that it used a cost study, submitted with Transmittal No. 565, to allocate the percentage of time spent by headquarters employees among voice grade, occasional television, full-time television, and all other services.

46. In response to Issue B1, Comsat states that it fully complied with the *Comsat Rate Case* and the *Second Structure* decisions in using the equivalency method it chose to develop space segment rates.[75] Comsat asserts that the parties who seek rates based on the IUC fundamentally misunderstand the nature of the charge. The IUC, according to Comsat, does not measure the total cost Comsat incurs in making satellite circuits available. Comsat further responds that its methodology using Intelsat ownership costs achieves a fair result because space segment usage, measured by the IUC, governs Comsat's ownership share in, and its capital contribution to, the Intelsat system.[76] Comsat defends its equivalency methodology as fair, explaining that due to a series of across-the-board rate reductions, the previously-existing rate for occasional television service of 5.12 per minute did not cover its Intelsat ownership costs, much less contribute to its in-house costs.[77]

47. Comsat explains that it computes Datanet rates by adding the Intelsat ownership costs and the in-house costs, computed from in-house costs for "like" services.[78] Comsat states that it made "very limited" use of equivalency factors in calculating its rates, and that in fact no Datanet circuits were leased. Comsat August 14 1987 Letter at 2. Equatorial responds that Comsat's "astronomical" in-house charges make it impossible for Equatorial to offer competitive rates in the market for international data services, and that this is the reason no Datanet circuits have been leased. Equatorial September 10 Letter at 3. Equatorial asks us to require Comsat to develop cost-based Datanet prices. *Id.*

2. ***Discussion and conclusion***

48. The *April 1987 Order* required Comsat to recalculate its occasional television service rates. This requirement was deferred and ultimately made moot by Comsat's subsequent revisions to the television service rates that reflected negotiations with the Networks.[79] In view of this transmittal, and the withdrawal of the Networks' application for review,[80] the television service issues appear to be moot. Accordingly, we terminate the investigation of these issues without making a determination on the merits.

49. We note that the term "equivalency ratio" refers to two aspects of rate development by which Comsat attributes costs to individual services. The first arises when Comsat sets the Intelsat-related component of its rates by reference to the Intelsat utilization fee charged signatories for specific services. The second application involves the allocation of Comsat's in-house costs to a service by using in-house costs for other services as a proxy, rather than directly developing or estimating costs for the service in question. Neither of these methods is unreasonable in theory, but each may raise problems in practice, especially with respect to competitive services such as Datanet. Using a surrogate for in-house costs may be vulnerable to abuse with respect to new or competitive services because

Comsat's method does not take account of differences in demand between the new service and the established service.

50. Comsat asserts that through the end of 1986 it made limited use of equivalency factors in developing in-house costs for Datanet, but leased no Datanet circuits during that period.[81] Any imprecision in the development of the Datanet rates could not result in refund liability for past periods, but continuation of the present rates could prejudice the interests of potential customers for a Comsat Datanet service. This record does not provide an adequate basis for a finding that the existing rate is unreasonable, but the record also does not provide an adequate basis for a finding that would foreclose relitigation of that question in a Section 208 complaint proceeding. We accordingly terminate our investigation of the reasonableness of Comsat's Datanet rates without making a determination on the merits.

IV. ORDERING CLAUSES

51. Accordingly, IT IS ORDERED that the investigation of Comsat Tariff F.C.C. Nos. 101 and 14, Transmittal Nos. 546, 553, 558, 565, 570, 574 and 575 IS TERMINATED, pursuant to Sections 4(i), 4(j), 201(b), 202, 204, and 205 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201(b), 202, 204, 205.

52. IT IS FURTHER ORDERED that the investigation of Comsat Tariff F.C.C. No. 101, Transmittal Nos. 507 and 510, IS TERMINATED.

53. IT IS FURTHER ORDERED that the accounting order instituted by the Bureau in paragraph 52 of the *Designation Order* which required Comsat to keep accounts of all amounts received under Transmittal No. 565 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Comsat Investigation Designation Order, CC Docket Nos. 80-634 and 85-268 (unpub.), Mimeo No. 0672, released Nov. 8, 1985 (*Designation Order*) ; Erratum, Mimeo No. 1703, released Dec. 27, 1985.

[2] Communications Satellite Corp., CC Docket Nos. 80-634 and 85-268, Phase I, 2 FCC Rcd 3706, (1987) (*April 1987 Order*).

[3] Communications Satellite Corp., CC Docket No. 80-634, Tariff F.C.C. No. 101, Transmittal Nos. 507 and 510, Mimeo No. 5797, released Aug. 2, 1984.

[4] Communications Satellite Corp., Implementation of Secion 505 of the International Maritime Satellite Telecommunications Act, 77 FCC 2d 564 (1980) (*Comsat Study*).

[5] Changes in the Corporate Structure and Operations of the Communications Satellite Corp., 90 FCC 2d 1159 (1982) (*First Structure Order*), *recon. denied*, 93 FCC 2d 701 (1983), *appeal dismissed sub nom.* RCA Global Communications v. FCC (unpub.), Case No. 83-1662 (D.C. Cir., Apr. 25, 1985).

[6] Changes in the Corporate Structure and Operations of the Communications Satellite Corp., CC Docket No. 80-634, 97 FCC 2d 145 (*Second Structure Order*), *recon. denied in part*, 99 FCC 2d 1040 (1984) (*Second Structure Reconsideration*).

[7] The *Second Structure Order* focused on four types of accounts to which costs were being assigned or allocated in a manner which did not reflect Comsat's then-existing activities: (1) general and administrative (G&A) expenses; (2) shared G&A capital costs; (3) shared research and development (R&D) expenses; and (4) shared R&D capital costs.

[8] This Commission reasoned that Comsat's formula based on relative property and revenues allocated shared expenses more heavily toward mature ventures with well developed property and revenues. Thus, a disproportionate share of expenses and capital costs was allocated to jurisdictional accounts since Comsat's new businesses were not yet generating substantial revenues and were not yet fully developed in terms of capital assets. The unsuccessful history of Comsat's competitive ventures, despite substantial expenditures, and its subsequent decision to dispose of these ventures confirms this assessment. *See* paras. 12-14, *infra*.

[9] Communications Satellite Corporation, Tariff F.C.C. No. 101, Transmittal Nos. 507 and 510, Implementing the Second Memorandum Opinion and Order in CC Docket No. 80-634, Mimeo No. 5797, released Aug. 2, 1984.

[10] That decision allowed Comsat to use a gross operating expenses formula, rather than the prescribed cash expenses formula, to allocate the expenses and capital for G&A and R&D categories between its jurisdictional and non-jurisdictional accounts. By including depreciation in the cash expenses formula (current gross operating expenses less depreciation), the gross operating expenses formula recognizes the capital assets of Comsat's various lines of business. *Second Structure Order*, 99 FCC 2d at 1060.

[11] The *Second Structure Order* required Comsat to retarget its rates to comply with its authorized rate of return of 11.48 percent (with 1 percent for efficiency). *See* 99 FCC 2d 1040 (1984); *Second Structure Reconsideration*.

[12] Communications Satellite Corporation, Tariff F.C.C. Nos. 101 and 14, Transmittal Nos. 546, 553, and 558, Implementing Reconsideration Order in CC Docket No. 80-634 and Report and Order in CC Docket No. 82-540, filed Feb. 1, 1985. Transmittal No. 553 is not discussed here as it merely corrected typographical errors made in Transmittal No. 546 and restored provisions governing cancellation of occasional use television service. Transmittal No. 558, also not at issue here, delayed service to new end users until Comsat established a separate earth segment services subsidiary, and deleted the definition of authorized user.

[13] Modification of Policy on Ownership and Operation of U.S. Earth Stations That Operate with the Intelsat Global Communications Satellite System, 100 FCC 2d 250 (1984).

[14] Transmittal No. 546 unbundled the previous 4 kHz voice grade circuit rate of1060 per month into separate space and earth segments: 655 for space segment (62 percent), and 405 for earth segment (38 percent).

[15] Communications Satellite Corporation Tariff F.C.C. No. 103, Transmittal No. 565, Establishing Separate, Unbundled Space Segment Offering, filed June 5, 1985.

[16] Comsat's in-house costs include Comsat's operational costs of providing service other than the costs of leasing Intelsat capacity.

[17] Comsat's Intelsat ownership costs are comprised of three elements: (1) its share of Intelsat's capital and operating expenses; (2) its 11.48 percent return; and (3) the United States

taxes Comsat paid on that return plus its depreciation expenses. Comsat states that these costs totaled approximately489 monthly per voice grade circuit.

[18] *See Designation Order.*

[19] *See , e. g.*, note 3, *supra.*

[20] This Commission subsequently determined in the *January 1988 Order* that Comsat's refund liability should be reduced. The Bureau established a separate proceeding for resolution of flow-through and distribution issues arising from that decision. Communications Satellite Corp., CC Docket 85-268, DA 88-238, released Feb. 26, 1988.

[21] *See April 1987 Order.* Comsat filed supplemental information directed to issues not resolved by the *April 1987 Order* on July 22, August 14, August 18, and August 26, 1987.

[22] Comsat, Annual Report at 26 (1987).

[23] *Id.*

[24] This Commission has authorized ESOC to discontinue operations at Brewster, 2 FCC Rcd 1167 (1987); authorized AT&T to operate the stations at Etam, Roaring Creek, and Jamesburg, 2 FCC Rcd 6635 (1987); and authorized MCI to operate the Andover earth station, 3 FCC Rcd 6 (1988).

[25] *See* 1987 Annual Report at 4, and Telecommunications Reports, Nov. 23, 1987.

[26] International Satellite Systems, Hearing before House Subcommittee on Telecommunications and Finance, Committee on Energy and Commerce, June 24, 1987, Serial No. 100-53.

[27] Absent Comsat's re-entry into non-jurisdictional operations on a similar scale, it does not have an incentive to burden the jurisdictional ratepayer with the cost of supporting such enterprises. Even if it reenters non-jurisdictional markets and attempts such practices, increased inter-media competition from optical cable and increased intra-media competition from independent satellite systems may well limit Comsat's ability to extract excessive profits from that aspect of its operations. Kwerel and McNally, OPP Working Paper 19, Promoting Competition Between International Telecommunication Cables and Satellites. Leland L. Johnson, "Government Regulations of Comsat," RAND Corp. Report R-3497-MF, January 1987. Establishment of Satellite Systems Providing International Communications (Separate Systems Decision), 101 FCC 2d 1046 (1985); Separate Systems Reconsideration, CC Docket No. 84-1299, FCC 86-144, released Apr. 17, 1986 (unpub.); Separate Systems Further Reconsideration, CC Docket No. 84-1299, FCC 86-471, released Oct. 31, 1986.

[28] The issue as specified in the *Designation Order* is limited in scope to Transmittal No. 546, although the text of that Order discussed the assertions directed by petitioners at Transmittal No. 565 as well. Indeed, while the particulars of Transmittal Nos. 546 and 565 vary to some degree, they reflect a common rate development methodology and each purports to implement this Commission's instructions in the *Second Structure Order* and related decisions such as the *Earth Station Ownership Order.* As the parties have generally not limited or differentiated their rate development and cost allocation criticisms between these two transmittals, either in their original petitions or since, the summary of pleadings that follows does not attempt an artificial limitation to the terms of the designated issue.

[29] Comsat Response [to Designation Order in CC Docket No. 85-268] at 3-4, filed Jan. 13, 1986 (Comsat Response [85-268]). For example, Comsat allocated to space segment costs such as Intelsat capital and related depreciation, the in-house costs associated with its departments devoted to Intelsat affairs and space segment planning. *Id.*

[30] Comsat Response [85-268] at 2-5. Comsat states that its rates for television and data services do not reflect the percentage split due to "unique equipment costs." *Id.* at 3-4.

[31] Fedex International Transmission Corp. (Fedex), FTCC McDonnell Douglas International Telecommunications Co. (FTCC), MCI International, Inc. (MCII), and TRT Telecommunications Corp. (TRT), Reply Case, filed Apr. 28, 1986.

[32] FTCC and TRT, Supplemental Reply Case and Comments at 8-14, filed Apr. 28, 1986.

[33] SIN, Inc., Reply Comments at 13-17, filed Apr. 28, 1986.

[34] Christopher J. Pleatsikas, "Analysis of Comsat Responses to FCC Investigation Order Dated January 13, 1986" at 6-7, filed Apr. 28, 1986 [submitted as Reply Case of ITT, Fedex, and IRI] (Pleatsikas Analysis [85-268]).

[35] *See* Transmittal No. 546, Exhibits 5 and 6. The39.6 million was allocated22.1 million (55.8 percent) to the space segment and 17.5 million (44.2 percent) to the earth segment.

[36] Letter from Ruth E. Sigler, Comsat, to Stanley P. Wiggins, Common Carrier Bureau, Attachment 2 at 1, filed July 22, 1987 (Comsat July 22 Letter). Comsat reiterated this statement in a meeting with Common Carrier Bureau staff on February 4, 1988.

[37] The Bureau imposed an accounting order in the *Designation Order* (at para. 52) by which it required Comsat and Comsat International to keep accurate accounts of all amounts received under Transmittal No. 565 and Transmittal No. 1, respectively. We now terminate that accounting order.

[38] Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, Report and Order, CC Docket No. 86-111, 2 FCC Rcd 1298, *modified on recon.*, 2 FCC Rcd 6283 (1987).

[39] In addition, Comsat's rate structure and levels during the period 1985-1987 did not occasion petitions against these tariffs from actual or potential earth station providers who would be most directly affected by rates that artificially repressed earth station charges for anticompetitive purposes.

[40] The 39.6 million of total costs for calendar year 1985 were allocated 22.1 million to space and 17.5 million to earth. Comsat Response [85-268] at 24. If we were to conclude that space had been misallocated by 1.1 million (5 percent of total expenses allocated to space), the impact would be 5.25 per forecast voice grade circuit per month (1,105,000 divided by 17,523 circuits divided by 12 months).

[41] Comsat, Response to Show Cause Order [April 1987 Order] at 36, filed May 15, 1987.

[42] TRT responds that Comsat fails to refute the Commission's findings regarding zero-cost funds. TRT, Statement on Flow-through Issues and Reply to Comsat's Response to Show Cause Order, Attachment A at 3, filed July 31, 1987. Attachment A is: A.J. Chisholm Associates, Inc. "Analysis of the Response to Show Cause Order of [Comsat]: Cost Disallowance Issues" (Chisholm Analysis).

[43] Comsat claims that actual demand is irrelevant and that the *April 1987 Order* resolved the demand questions in Comsat's favor, fuling that Comsat's methodology for estimating demand was not unreasonable. Comsat Response to Show Cause Order at 38.

[44] Amendment of Part 65 of the ommission's Rules to prescribe components of the rate base and net income dominate carriers (*Rate Base Order),* 2 FCC Rcd 269 (1987).

[45] We believe that a period of 10 years is sufficient lag between cash working capital studies and we urge Comsat to conduct a new study of this source of funds.

[46] Letter from Comsat to Secretary, Federal Communications Commission, Aug. 26, 1987. The attachment identified which items in the pooled category were allocated to which organizational unit.

[47] Comsat Response [85-268] at 7.

[48] Comsat allocated1.2 million of this amount to space and1 million to earth. Transmittal No. 546, D&J, Exhibit 6 at 2.

[49] NMAS is a corporate computer communications monitoring and control system, which records circuit assignments for spacecraft and earth stations, records service orders, tracks system faults, records billing and tracks spare equipment (inventory).

[50] Comsat July 22 Letter, Attachment 2 at 2. Comsat notes that the NMAS is integral to the billing process for both space and earth segments, and that if it had not shared the system it would have had to duplicate it at great expense. Comsat, Supplemental Response at 17, filed July 9, 1986.

[51] Comsat July 22 Letter, Att. 2 at 4. Comsat adds that if the allocation to the space segment is reduced, then the allocation to the ground segment is necessarily increased. *Id.* at 1; Comsat Response to Show Cause Order at 39-40.

[52] Comsat July 22 Letter, Att. 2 at 1.

[53] Comsat Response [85-268] at 8. Chisholm argues that it would be reasonable for Comsat to allocate NMAS costs wholly to the earth segment because if a competitive supplier of earth station services used the NMAS it would be able to recover these costs only through its earth staion charges. Chisholm Analysis at 11.

[54] *April 1987 Order*, 2 FCC Rcd at 3717. Communications Satellite Corp., CC Docket Nos. 80-634 and 85-268, 2 FCC Rcd 4417, 4419 (1987) (*Refund Schedule Order*).

[55] In a pleading regarding Transmittal No. 565, Pleatsikas objected to Comsat's allocation of half of NMAS capital to the space segment. Christopher J. Pleatsikas, "Analysis of Comsat Tariff Filing in Transmittal No. 565" at 5-6, filed June 20, 1985 (Pleatsikas Analysis [565]).

[56] Comsat Tariff F.C.C. No. 103, Transmittal No. 659, filed May 22, 1987. Comsat states that the allocations should have been made on the basis of a split of 21 percent to space and 79 percent to earth, but it allocated based on a split of 19 percent and 81 percent as required by the *April 1987 Order*. Comsat July 22 Letter, Att. 2 at 5.

[57] Comsat Supplemental Response in CC Docket 85-268 at 10-11, filed July 9, 1986.

[58] RCA Communications, Inc., Petition for Suspension, Investigation and Interim Prescription Relief [of Transmittal No. 546], filed Feb. 19, 1985 at 4 (RCA Petition [546]).

[59] Pleatsikas Analysis [565] at 3.

[60] Comsat Opposition [565] at 8.

[61] Comsat Response [85-268] at 9.

[62] Transmittal No. 546, D&J, Exhibit 6.

[63] Regulatory Policies Concerning Direct Access to Intelsat Space Segment, 97 FCC 2d 296, 318 (1984).

[64] Datanet is Comsat's offering of Intelsat's Intelnet service. It provides one-way communications channels between a customer terminal and a satellite for the transmission of data only. *See* Comsat Tariff F.C.C. No. 103, § 3.4.1.

[65] Univision, Comments on the Networks' Joint Application for Review at 1, filed May 21, 1987 (Univision Comments).

[66] Capital Cities/ABC, CBS, and NBC, Application for Review [of *April 1987 Order*] at 4-8, filed May 6, 1987 (Network Application for Review). *See also* American Broadcasting Companies, Inc., CBS, Inc., and National Broadcasting Company, Inc., Comments [in CC Docket No. 85-268] at 21-22, filed Apr. 28, 1986 (Network Comments).

[67] Turner, Reply [in CC Docket No. 85-268] at 14, filed Apr. 28, 1986 (Turner Reply [85-268]).

[68] Comsat Cost Support for Transmittal No. 565 at 4.

[69] Network Comments at 20-25.

[70] Pleatsikas Analysis at 24-26. The IUC is the charge that users must pay for Intelsat's provision of space segment.

[71] Turner Reply [85-268] at 6-9.

[72] Letter from Phillip L. Spector, for Equatorial, to Secretary, Federal Communications Commission at 2, dated Sept. 10, 1987 (Equatorial September 10 Letter). *See also* Equatorial Petition To Reject or Suspend [Transmittal No. 565] at 5-7, filed June 24, 1985 (Equatorial Petition [565]).

[73] Comsat Opposition to Petitions for Suspension, Investigation or Rejection at 14, filed Mar. 1, 1985 (Comsat Opposition [546]).

[74] *See* Transmittal No. 565, Att. IV.

[75] Comsat Opposition [546] at 6-7.

[76] Comsat Opposition [565] at 15.

[77] *Id.* at 16.

[78] Letter from Ruth E. Sigler, Comsat, to Stanley P. Wiggins, Common Carrier Bureau at 2, dated Aug. 14, 1987 (Comsat August 14 Letter). Comsat previously stated that its method of developing Datanet rates on the basis of the IUC for voice grade circuits and the in-house charges for full-period television was reasonable because Datanet was a new service, and Datanet was substantially similar to transponder lease service. Comsat Opposition [565] at 18-19.

[79] Comsat proposed new rates in Transmittal No. 666, filed July 31, 1987.

[80] Letter from Joseph A. Godles, Attorney for Turner Broadcasting System, Inc., to Secretary, Federal Communications Commission, dated Nov. 13, 1987. The Networks jointly filed an application for review of the portion of this Commission's *April 1987 Order* relating to occasional television services. CBS, *et al.*, Application for Review, filed Aug. 13, 1987.

[81] *See* Comsat August 14 Letter.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Access Filings of Small
Telephone Companies

MEMORANDUM OPINION AND ORDER

Adopted: December 7, 1988; Released: December 9, 1988

By the Deputy Chief, Common Carrier Bureau:

1. In CC Docket No. 86-467,[1] the Commission amended Parts 1, 61, and 69 of its Rules, 47 C.F.R. Parts 1, 61, 69, to reduce some of the tariff filing requirements otherwise applicable to small local exchange carriers (LECs)[2] electing to file their own access tariffs. [3] In this Order, this Bureau is further reducing the tariff filing requirements of small LECs by waiving, on our own motion, Sections 61.54(a), 61.54(j), and 61.74(a) of the Commission's Rules, 47 C.F.R. §§ 61.54(a), 61.54(j), 61.74(a), in order to enable small LECs to reference the National Exchange Carrier Association (NECA) simplified terms and conditions tariff.

2. Under the amended rules, NECA is required to file a simplified tariff containing only terms and conditions.[4] NECA's new Tariff F.C.C. No. 5,[5] which cancelled its former Tariff F.C.C. No. 1, was issued in order to streamline and reorganize the terms and conditions for the provision of access services. One of the purposes for NECA issuing its new Tariff F.C.C. No. 5 was designed in part to provide the terms and conditions in compliance with the *Small Company Order* which the small telephone companies could reference.

3. The *Small Company Order* permits small LECs that choose to file their own tariffs to file their own rate schedules for a biennial period rather than on an annual basis as required of the larger LECs, and to reference the NECA simplified tariff for their terms and conditions. Small LECs electing to file their own rate schedules are to file their initial tariffs on not less than 90 days' notice to become effective April 1, 1989.[6]

4. Section 61.74(a) of the Commission's Rules, 47 C.F.R. § 61.74(a), prohibits a tariff from making reference to any other tariff publication, document, or instrument. The only exceptions are referencing concurrences for the purpose of stating where rates or regulations applicable to a service not governed by a tariff may be found, or referencing to another carrier's tariffs participating in an end-on-end through service.

5. The *Small Company Order* says that one commenter requested that the Commission issue a blanket waiver permitting companies to reference the NECA terms and conditions tariff. In addressing those commenters who advocated that the Commission permit small LECs to participate selectively in the NECA tariff or incorporate only certain applicable terms and conditions in their own tariffs, the Commission determined that small LECs availing themselves of the simplified tariff procedures would have to use an "all-or-nothing" approach.[7] To do otherwise, the Commission said, would be cumbersome and confusing. The Commission, however, never addressed the issue of granting the blanket waiver.

6. Likewise, Sections 61.54(a) and 61.54(j) of the Commission's Rules, 47 C.F.R. §§ 61.54(a), 61.54(j), provide that, among other things, a tariff must contain general rules (including definitions), regulations, exceptions, and conditions, and that such items must be stated clearly and definitely. Tariffs must not be ambiguous, and nothing may be included in a tariff which attempts to substitute a rate, rule, regulation, exception, or condition named in any other tariff.

7. The purpose of the rules adopted in CC Docket 86-467 would clearly be frustrated if small LECs were required to request a waiver of Sections 61.54(a), 61.54(j), and 61.74(a) of the Rules in order to make reference in their own rate schedule to the NECA simplified terms and conditions tariff.

8. Therefore, on our own motion, the Bureau will waive Sections 61.54(a), 61.54(j), and 61.74(a) of the Commission's Rules for any small LEC which chooses to file its own rate schedule pursuant to Sections 61.39 and 69.3(f), either for this biennial period or any subsequent biennial period. This will allow these LECs to make reference *in toto* to the NECA simplified terms and condition tariff in their rate schedules. This blanket waiver is granted for no other purpose than as stated in this Order. Small LECs wishing to cross reference other tariffs, documents, or instruments for any other purpose, must comply with the procedures in Part 61 and file an application for special permission pursuant to Sections 61.151 through 61.153 of the Commission's Rules, 47 C.F.R. §§ 61.151-61.153, adequately justifying such waiver request, and must pay the appropriate filing fee.

9. Accordingly, IT IS ORDERED that for the purpose stated in this Order, Sections 61.54(a), 61.54(j), and 61.74(a) of the Commission's Rules, 47 C.F.R. §§ 61.54(a), 61.54(j), 61.74(a), ARE WAIVED and Special Permission No. 88-579 is assigned.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief
Common Carrier Bureau

FOOTNOTES

[1] *See* Regulation of Small Telephone Companies, CC Docket No. 86-467, 2 FCC Rcd 3811 (1987) (*Small Company Order);* Regulation of Small Telephone Companies, CC Docket No. 86-467, 3 FCC Rcd 5770 (1988).

[2] A small LEC is defined as any LEC having not more than 50,000 lines in a study area. 47 C.F.R. § 61.39(a).

[3] *Small Company Order*, 2 FCC Rcd at 3811.

[4] 47 C.F.R. § 69.603(c).

[5] NECA Tariff F.C.C. No. 5, Transmittal No. 298, filed Apr. 29, 1988, effective June 13, 1988.

[6] 47 C.F.R. §§ 61.39(a), 69.3(f). Although the *Small Company Order* contemplates an effective date of January 1, 1989, the Commission has adopted rule changes which delay the effective date of the 1989 annual access tariffs until April 1, 1989, with subsequent years having a scheduled effective date of July 1. *See* Access Tariff Filing Schedules, CC Docket No. 88-326, Report and Order, FCC 88-283, released Sept. 14, 1988.

[7] *Small Company Order*, 2 FCC Rcd at 3814.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-382

In re Applications of

WWOR-TV, INC. File No. BRCT-871221KE

For Renewal of License of Station
WWOR (TV), Secaucus, New Jersey

and

GARDEN STATE BROADCASTING LIMITED PARTNERSHIP File No. BPCT-871223KG

and

WHITELY COMMUNICATIONS File No. BPCT-880321KM

For Construction Permit
Secaucus, New Jersey

MEMORANDUM OPINION AND ORDER

Adopted: December 12, 1988; Released: December 22, 1988

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. On November 21, 1988, Garden State Broadcasting Limited Partnership (Garden State) filed an appeal, motion for acceptance of appeal, and motion for stay. These pleadings are directed to the *Memorandum Opinion And Order* (FCC 88M-3567, released October 25, 1988) issued by Administrative Law Judge Richard Sippel (ALJ) which specified financial, misrepresentation, and abuse of process issues against Garden State. Garden State claims that unlike routine enlargement of issues cases where issues are added because of the existence of substantial and material questions of fact, the issues here were specified on the basis of the "ALJ's perception" that such issues "would comport with Commission 'policy'" not yet fully developed in a notice of inquiry and proposed rule making in *Prevention of Abuses of the Renewal Process*, 3 FCC Rcd 5179 (1988) (Commission expresses concern that the renewal process is being subverted by parties filing applications for the purpose of extracting settlements from incumbent licensees). Garden State seeks a stay of the proceeding pending consideration of the appeal, contending that it will be required to produce extensive documents relating to the added issues, by December 16, 1988, pursuant to discovery, in the absence of a stay. Opposing pleadings were filed by the Mass Media Bureau and WWOR-TV, Inc. on December 1, 1988. For the reasons set forth below, we will deny the motion for acceptance of appeal and dismiss the appeal and motion for stay.

2. Under Section 1.243 of the Commission's Rules, 47 CFR §1.243, authority to regulate the course of the hearing and to rule on questions of evidence is vested in the presiding ALJ, and both the Commission and the Board have underscored the wide latitude and broad discretion conferred on the ALJ's in presiding over hearings. *See Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 (1986), *appeal dismissed mem. sub nom. Punta Ybel Communications, Ltd. v. FCC*, No. 86-1670 (D.C. Cir. Feb. 29, 1988); *Pan American Broadcasting Co., Inc.*, 89 FCC 2d 167, 170 (Rev. Bd. 1982). Section 1.301 (b) of the Commission's Rules, 47 CFR §1.301 (b), which governs interlocutory rulings not appealable as a matter of right, provides in pertinent part that "appeals from interlocutory rulings of the presiding officer shall be filed only if allowed by the presiding officer." Here, by *Memorandum Opinion and Order*, FCC 88M-3846, released November 14, 1988, the ALJ denied Garden State's motion for leave to appeal the rulings in question. Where consent is not obtained from the ALJ, the appeal will not be entertained unless the appealing party has demonstrated "such a flagrant abuse of discretion as would inevitably require a reversal of the Initial Decision and a hearing *de novo* ; or where the proceeding involves basic and far reaching considerations of public policy and vital concerns relating to the public interest which could not otherwise adequately be protected." *Communications Satellite Corp.*, 32 FCC 2d 533, 534 (1971); *Ronald Sorensen*, 3 FCC Rcd 5022 (Rev. Bd. 1988); *Charisma Broadcasting Corp.*, 2 FCC Rcd 2979 (Rev. Bd. 1987); *Horizon Community Broadcasters, Ltd.*, 100 FCC 2d 1388 (Rev. Bd. 1985); *High Springs Television, Inc.*, 100 FCC 2d 247 (Rev. Bd. 1985); *Jan - Di Broadcasting, Inc.*, 93 FCC 2d 890 (Rev. Bd. 1983).

3. Even if Garden State were correct that certain of the issues were added predicated on the ALJ's "perception" of Commission inchoate "policy," we fail to perceive how the addition of the specified issues implicates either of the concerns set forth in *Communications Satellite Corp., supra*. In fact, we tend to agree with the ALJ's observation in his opinion denying permission to appeal that a hearing *de novo* would be more likely where pertinent hearing issues have been denied. Moreover, Garden State's major premise is wrong. Potential abuses of the Commission's processes are not a new matter of concern to the Commission. *See Silver Star Communications - Albany, Inc.*, FCC 88R-60, released November 2, 1988 (license revoked for abuse of the Commission's minority "distress sale" process and willful statutory violation); *Gulf Coast Communications, Inc.*, 81 FCC 2d 499, 509-515 (Rev. Bd. 1980), *review denied*, FCC 82-128 (1982), *aff'd per curiam*, No. 82-1760 (D.C. Cir. July 6, 1983)(license renewal denied where applicant attempted to use Commission's processes as a lever to induce another licensee to agree to terms on the sale of her stations). And, in 1981 Congress amended the Communications Act, 47 USC 311(d), to ensure that an application is not filed for purposes of extracting settlement agreements from renewal applicants. 95 Stat. 357, 737-38, Aug. 13, 1981. Finally, we agree with the Mass Media Bureau that the issues were specified by the ALJ because substantial factual questions had been raised concerning these matters. Thus, we cannot find that Garden State has met the heavy burden of establishing an abuse of discretion by the ALJ. *See Ronald Sorensen*,

supra. See also Arcatel, Inc., 92 FCC 2d 893, 895 (Rev. Bd. 1982) (Board is "loath to intervene in ongoing adjudicatory proceedings" pending elsewhere "except in the most extraordinary circumstances).

4. Garden State also contends that review may be appropriate even in the absence of a "flagrant abuse of discretion" or "egregious error" where the circumstances are sufficiently unusual so as to warrant interlocutory review, citing *RKO General, Inc.*, FCC 85-320, released July 2, 1985, and *RKO General, Inc.*, 60 RR 2d 1694 (1986). Those cases, however, are unavailing to Garden State because of their extraordinary nature. *See RKO General, Inc.*, FCC 85-320 at n.4 where the Commission emphasized that "we are taking the unusual step of waiving Section 1.301(b) only because of the protracted nature [more than two decades] of the KHJ-TV proceeding and our desire to reach a final resolution of RKO's basic and comparative qualifications in as expeditious a manner as possible. Accordingly, our action herein should not be interpreted as an indication that we will follow a similar course of action in other, ordinary proceedings, or that we are in any way relaxing the type of showing normally required for justifying waiver of Section 1.301(b) of the Rules". There are no similarities between the RKO cases and the case now before us that would warrant a similar waiver here. In view of our disposition, we will not reach the merits of the motion for stay. But, even if we were to reach the merits of the stay request, Garden State has failed to make the complete showing required by *Virginia Petroleum Jobber's Ass'n v. FPC*, 259 F. 2d 921, 925 (D.C. Cir. 1958) and *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F. 2d 841 (D.C. Cir. 1977).

5. ACCORDINGLY, IT IS ORDERED, That the motion for acceptance of appeal filed November 21, 1988 by Garden State Broadcasting Limited Partnership IS DENIED; and that the appeal, filed November 21, 1988, and the motion for stay, filed November 21, 1988 and supplemented December 1, 1988, by Garden State Broadcasting Limited Partnership, ARE DISMISSED.[1]

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

FOOTNOTE

[1] In light of the December 16 discovery date, the Board has provided advance copies of this opinion to the parties prior to release of the final printed FCC Record copy.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-140

In re Applications of

CATHERINE JUANITA HENRY	File No. BPH-831118AP
HARBOR COMMUNICATIONS, A California Limited Partnership	File No. BPH-840725IB
Earnel Durden and Une Durden d/b/a DURDEN BROADCASTING CO.	File No. BPH-840727ID
SIMPSON COMMUNICATIONS LTD., A Limited Partnership	File No. BPH-840727IG
ECHEVERRIA BROADCASTING CORPORATION	File No. BPH 840727IJ
AMIGOS DE SAN DIEGO, A California Limited Partnership	File No. BPH-840727IM
REPRESENTATIVE MEDIA LIMITED PARTNERSHIP	File No. BPH-840727IP
TRIPLE BOGEY BROADCASTING, A California Limited Partnership	File No. BPH-840727IT
NEW SOUNDS OF SAN DIEGO, INC.	File No. BPH-840727IU
SAN DIEGO BROADCASTING, A California Limited Partnership	File No. BPH-840727IV
AMERICAN MEDIA GROUP, A Limited Partnership	File No. BPH-840727IW
SAN YSIDRO COMMUNICATIONS, A Limited Partnership	File No. BPH-840727IY
SAN DIEGO COMTRENDS, INC.	File No. BPH-840727JD
VISTA GRANDE BROADCASTING, A California Limited Partnership	File No. BPH-840727JI
DIANE OSEQUERA	File No. BPH-840727JJ
SOLEDAD BROADCASTING COMPANY	File No. BPH-840727JK
MARIA ELENA LASO BRADLEY	File No. BPH-840727JL

For Construction Permit for a New FM Station at San Diego, California

MEMORANDUM OPINION AND ORDER

Adopted: December 8, 1988; Released: December 22, 1988

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. The above-captioned applications are all mutually exclusive, each seeking authority to construct and operate a new FM station at San Diego, California. In a 600-paragraph *Initial Decision*, 3 FCC Rcd 1492 (1988)(I.D.), presiding Administrative Law Judge Joseph Chachkin (ALJ) determined that the application of Representative Media Limited Partnership (RMLP) should be granted and that the applications of the twenty-one remaining parties should be denied.

2. Seventeen of the remaining parties filed exceptions with the Board and oral argument was scheduled.[1] However, on the eve of oral argument, the parties jointly requested that the argument be continued for a brief period of time to allow the parties to submit a universal settlement agreement. It is this Joint Petition for Approval of Agreement, as filed October 27, 1988, (Joint Petition), and related pleadings subsequently filed, that is the subject of our instant *Order*.

3. In addition to the Joint Petition, Triple Bogey Broadcasting (TBB) also filed on October 27, 1988, a Motion for Leave to Amend proposing to modify its application to reflect (1) the formation of a new limited partnership, KIFM Broadcasting Limited Partnership (KIFM), to be the proposed permittee, and (2) changes in the ownership interests of TBB. Under this proposed amendment, KIFM would be owned by TBB (74%) and RMLP (25%).[2] Additionally, Kamony Broadcasting, Inc. (Kamony), TBB's general partner, would possess a one percent ownership interest in KIFM. Kamony would be the general partner of KIFM, with TBB and RMLP the KIFM limited partners.

4. Thus, the parties seek (1) approval of the settlement agreements between TBB and each of the remaining parties captioned above; (2) grant of TBB's Motion for Leave

to Amend; (3) acceptance of the amendment substituting KIFM Broadcasting Limited Partnership for TBB; (4) dismissal of the competing applications of all the remaining parties; and (5) grant of the construction permit to KIFM.

5. Our initial review of the Joint Petition revealed several deficiencies. Therefore, by *Order* (FCC 88R-62), released November 25, 1988, the Board ordered that additional documents be filed to supplement the Joint Petition. The parties have timely filed the requested data.

6. The Commission's Mass Media Bureau has filed comments supporting the settlement agreements and the amendment. However, in an opposition to the Joint Petition filed November 14, 1988, the Reginald A. Fessenden Educational Fund, Inc. (Fessenden), a non-party to the instant proceeding,[3] submits that the agreement should not be approved. More specifically, it argues that RMLP, which stands to become a 25% limited partner in KIFM, is not basically qualified to be a licensee. Relying largely on arguments made in the exceptions of Vista Grande Broadcasting, Limited Partnership (VGB), Fessenden contends that RMLP engaged in a pattern of misrepresentation throughout the proceeding pertaining, *inter alia*, to its principals' claimed integration, broadcast experience, and civic involvement. It submits that the ALJ should have added a misrepresentation issue against RMLP as requested by American Media Group, Limited (AMG) (the ALJ specifically declined to add the issue(s). *See Memorandum Opinion and Order*, FCC 86M-1333, released April 18, 1986)) and disqualified RMLP even in the absence of such an issue. Fessenden now urges the Board to either deny the Joint Petition or remand the matter to the ALJ to determine RMLP's basic qualifications.

7. Fessenden's opposition request will be denied. In our previous *Order*, (FCC 88R-62, *supra*), we dismissed a motion by Fessenden which sought an extension of time to file the pleading now before us. We there ruled that Fessenden lacked standing to challenge the settlement because it was not a party, and had not sought party status. Although Fessenden's status has not changed, it now requests formal intervention, pursuant to Section 1.223 of the Commission's Rules, 47 CFR §1.223. Fessenden's intervention request is exceptionally late-filed, however, coming after completion of the hearing, issuance of the I.D., and submission of the proposed settlement to the Board. Further, Fessenden makes no effort to comply with the requirement of 47 CFR §1.223(c) that it demonstrate why it was not possible to intervene in a timely fashion. *See Golden State Broadcasting Corp.*, 52 RR 2d 1253 (Rev. Bd. 1982). Nor has Fessenden shown, in view of the multi-party nature of this proceeding and the active participation in the allegations against RMLP by at least two applicants mentioned in its pleading, how its particular participation as a party would have assisted the Commission in this matter, even if timely filed, as also required by 47 CFR §1.223(c).[4] *See De Beau Broadcasting, Inc.*, FCC 85R-35, released April 26, 1985 (in multi-party case, other parties "are presumably capable of developing a full record" under issue in question). As noted earlier, the ALJ, after close consideration, specifically *denied* the requested misrepresentation issue against RMLP, and we do not believe it appropriate for Fessenden, which did not participate at the hearing, or file exceptions, or attempt to intervene when exceptions were filed in May 1988, to now petition for intervention without any showing of how its participation could assist the Commission in its determination of the matter. In short, Fessenden has not justified intervention at this stage of the proceeding under the rigors of 47 CFR §1.223.[5]

8. Having reviewed all the documents submitted in this complex proceeding, we find that accepting the amendment substituting KIFM for TBB will not require the addition of any new issues or parties, will not prejudice any party to this proceeding, and will expedite the resolution of this complicated adjudicatory proceeding. The Petition for Leave to Amend is supported by good cause, and therefore may be granted. *Knoxville Broadcasting Corp.*, FCC 88I-097, released October 4, 1988.

9. Further, the Joint Petition, as supplemented, complies fully with the provisions of 47 U.S.C. §311(c) of the Communications Act and 47 CFR §73.3525(a) of the Commission's rules, which govern settlement agreements. Attached to the Joint Petition are copies of the settlement agreements between TBB and each of the dismissing applicants. The Joint Petition states that approval of the settlement agreements will serve the public interest by conserving the resources of the parties and of the Commission, and by expediting the initiation of new FM broadcast service to San Diego, California.

10. Finally, in accordance with the requirements of Section 311(c) of the Communications Act, and Section 73.3525 of the Commission's rules, the parties also submit statements under penalty of perjury, or affidavits, from each party to the various settlement agreements. The statements certify that their respective applications were not filed for the purpose of entering into or carrying out a settlement agreement, and that approval of the settlement agreement will serve the public interest by expediting service to the public.

11. ACCORDINGLY, IT IS ORDERED, That the Motion for Leave to Amend, filed on October 27, 1988, by Triple Bogey Broadcasting IS GRANTED; that the amendment IS ACCEPTED; and KIFM Broadcasting Limited Partnership IS SUBSTITUTED for Triple Bogey Broadcasting (File No. BPH-840727IT).

12. IT IS FURTHER ORDERED, That the Joint Petition for Approval of Agreement, filed on October 27, 1988, by the captioned parties and the Motion for Leave to Supplement Joint Petition filed November 14, 1988 by Triple Bogey Broadcasting ARE GRANTED; that the attached settlement agreements ARE APPROVED; that the application of KIFM Broadcasting Limited Partnership (File No. BPH-840727IT) IS GRANTED; and that the applications of Catherine Juanita Henry (File No. BPH-831118AP); Harbor Communications, a California Limited Partnership (File No. BPH-840725IB); American Media Group, Limited Partnership (File No. BPH-840727IW); Earnel Durden and Une Durden, d/b/a Durden Broadcasting Co. (File No. BPH-840727ID); Simpson Communications, Ltd., a Limited Partnership (File No. BPH-840727IG); San Diego Comtrends, Inc. (File No. BPH-840727JD); Echeverria Broadcasting Corporation (File No. BPH- 840727IJ); Amigos De San Diego, a California Limited Partnership (File No. BPH-840727IM); New Sounds of San Diego, Inc., (File No. BPH-840727IU); San Diego Broadcasting, a California Limited Partnership (File No. BPH-840727IV); San Ysidro Communications, a Limited Partnership (File No. BPH-840727IY); Vista Grande Broadcasting, a California Limited Partnership (File No. BPH- 840727JI); Diane Osequera (File No. BPH-840727JJ); Soledad Broadcasting Company (File No. BPH-840727JK); Maria Elena Laso

Bradley (File No. BPH- 840727JL); and, Representative Media Limited Partnership (File No. BPH- 840727IP) ARE DISMISSED.

13. IT IS FURTHER ORDERED, That the Opposition to Joint Petition Petition for Approval of Agreement, filed November 14, 1988, and the Informal Objection to Joint Petition for Approval of Agreement, filed on December 5, 1988, by the Reginald A. Fessenden Educational Fund, Inc. ARE DISMISSED.

14. IT IS FURTHER ORDERED, That the following pleadings ARE DISMISSED as moot: (a) Petition for Leave to Amend filed March 3, 1988 by San Diego Comtrends, Inc.; (b) Petition for Leave to Amend filed March 21, 1988 by American Media Group; (c) Petition for Leave to Amend filed April 18, 1988 by Vista Grande Broadcasting; (d) Petition for Leave to Amend filed May 17, 1988 by Representative Media Limited Partnership; (e) Petition to Reopen Record filed May 18, 1988 by San Diego Broadcasting; (f) Motion for Leave to File Supplement filed May 19, 1988 by Echeverria Broadcasting Corporation; (g) Petition for Leave to Amend filed May 23, 1988 by San Diego Comtrends, Inc.; (h) Petitions for Leave to Amend filed May 27, 1988, June 2, 1988, and July 5, 1988, by Representative Media Limited Partnership; (i) Request for Leave to Accept Supplement to Exceptions filed June 3, 1988 by Simpson Communications Ltd; (j) Motion for Acceptance of Reply Brief in excess of page limitation and to file corrected tables of contents and authorities filed June 16, 1988 by Representative Media Limited Partnership; (k) Petition for Leave to Amend filed August 9, 1988 by New Sounds of San Diego, Inc.; (l) Petition for Leave to Amend filed September 29, 1988 by Vista Grande Broadcasting; (m) Motion to Strike Pleadings filed November 14, 1988 by Triple Bogey Broadcasting and Representative Media Limited Partnership; (n) Motion to Dismiss filed November 25, 1988 by Triple Bogey Broadcasting and Representative Media Limited Partnership; and (o) briefs and exceptions filed by all parties.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] Five of the twenty-two remaining applicants did not file exceptions. Thus, pursuant to 47 CFR §1.276(f), the applications of California Women in Radio, National University, Kaliedescope Communications Committee, HG Communications, and Colom Communications Corporation were dismissed by *Order*, 3 FCC Rcd 5569 (Rev. Bd. 1988).

[2] In addition to the 25% limited partner ownership interest, RMLP possesses certain styled "put rights" designed to require the purchase by TBB of certain of RMLP's interests. The monetary consideration to be paid to the other remaining applicants totals approximately 6,000,000.00.

[3] In its Opposition, Fessenden states (1) that it is a not for profit, tax exempt, educational and charitable foundation; and (2) that under an agreement approved by the Commission for the interim operation of KIFM, the interim operator of the facility, AFC Broadcasting, Inc., is obliged to pay 10% of its operating profits to Fessenden "to further its charitable works." Opposition, n. 1.

[4] We also note, and as RMLP and TBB have highlighted in their Joint Reply and Motion to Dismiss, filed November 25, 1988, that at least three other parties also raised or responded to the misrepresentation allegations against RMLP in their respective pleadings. (*See* Br. at 4, n.3).

[5] On December 5, 1988, Fessenden also filed a pleading styled "Informal Objection to Joint Petition for Approval of Agreement," which is identical in all respects to its November 14, 1988, Opposition to Joint Petition, except for the title. This pleading will be dismissed. We will not permit Fessenden to circumvent 47 CFR §1.223 by simply restyling its pleading, and filing it at this late date in the proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-553

In re Applications of

WINTON BROADCASTING COMPANY (hereafter Winton) File No. BPH-880126ND

TGR BROADCASTING, INC. (hereafter TGR) File No. BPH-880126NJ

For Construction Permit
for a New FM Station
on Channel 254A
in Winton, California

HEARING DESIGNATION ORDER

Adopted: November 21, 1988; Released: December 20, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and applicants have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by Winton and TGR would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

3. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

4. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Winton and TGR would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, better serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

5. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

6. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

7. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

8. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-564

In re Applications of

BLOUNTVILLE EDUCATION ASSOCIATION, INC.
(hereafter BEA)
Blountville, Tennessee — File No. BPED-840404IA

Req: Channel 203A (88.5 MHz)
0.47 kW (H&V), 64 meters

FAMILY STATIONS, INC.
(hereafter Family)
Bristol, Tennessee — File No. BPED-840629IK

Req: Channel 202C2 (88.3 MHz)
1 kW (H&V), 552 meters

For Construction Permit for
New Noncommercial FM Facilities

HEARING DESIGNATION ORDER

Adopted: November 25, 1988; Released: December 20, 1988

By the Chief, Audio Services Division:

1. The Commission has under consideration the above-captioned mutually exclusive applications.

2. *Preliminary Matter*. On June 5, 1987, BEA filed a petition for reconsideration of the FM Branch's May 7, 1987 return of its application for failure to respond to the Branch's request, dated August 9, 1986, for a corrected transmitter site map. In its petition, BEA claimed that "the information requested is and has been on file with the original application," but submitted an additional engineering statement "repeating the coordinates, scale and elevations previously filed." After a review of both BEA's application and the amendment, the staff has concluded that the tendered site map did not clearly and legibly display the topographic contour lines. However, since noncommercial FM channels are exempt from the revised processing procedures detailed in the Commission's *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (1985), noncommercial applicants may still submit "relatively minor curative amendments within 30 days of each return." *Public Notice* entitled "Future Policy on Incomplete and Patently Defective AM & FM Construction Permit Applications." 56 RR 2d 776, 778 (1984), *recon. denied* 57 RR 2d 1603 (1985). Examination by the FM Branch's technical staff confirms that the amended site map satisfies all Commission requirements. Accordingly, BEA's petition for reconsideration will be granted and its application reinstated *nunc pro tunc*.[1]

3. *BEA*. On October 4, 1984, Isothermal Community College (Isothermal) filed an informal objection to BEA's application.[2] Isothermal alleged that BEA "is not an educational organization within the meaning of Section 73.503(a)" since its application "does not contain a showing for the Commission to conclude that its primary purpose is educational." *Objection*, at paragraphs 6 and 7. 47 C.F.R. § 73.503(a) requires that reserved channels be licensed to nonprofit educational organizations only upon a showing that the station applied for will be used for the advancement of an educational program. *See, Seattle Public Schools*, 103 FCC 2d 862 (1986), and *Way of the Cross of Utah, Inc.*, 58 RR 2d 455 (1985). By an amendment on May 16, 1984, BEA submitted its corporate charter which states that its purposes "are for scientific, educational and charitable programs within the meaning of 501 (c)(3) of the Internal Revenue Code of 1954, and in this connection to . . . work with public schools and colleges and universities in order to further their educational and cultural goals . . . " In Exhibit 1 of its application, BEA states:

> It will be the purpose of the station to provide educational programs from the station as well as further the educational objectives of the public schools and colleges in the coverage area by broadcasting programs which they produce. Religious and secular programs are proposed.

Looking at BEA's application as a whole, BEA has demonstrated that it has an educational goal and is committed to the advancement of an educational program to service its community of license. *Way of the Cross of Utah*, 58 RR 2d at 457 n.5. Moreover, from its program proposal it has demonstrated how it proposes to serve its educational purpose, *e.g.*, 90 minutes of programming produced by the four colleges in its service area, 90-plus minutes of diversified general educational and a 49-minute instructional program, "Radio School of the Bible." Accordingly, Isothermal's objection will be denied.

4. *Family*. On June 18, 1987, The Moody Bible Institute of Chicago, Inc. (Moody) petitioned for reconsideration of the listing of Family's application as accepted for filing as mutually exclusive "with applications which were accepted for filing and listed previously as subject to a cut-off date for competing applications." *Public Notice* No. B-80, released May 22, 1987. Moody alleged that this listing "is and was patently incorrect inasmuch as the Blountsville application, the only application mutually exclusive with the Family proposal, has been previously dismissed by the Bureau." This allegation is unfounded. Although BEA's application was dismissed two weeks prior to the release of the "B cut-off" list, 47 C.F.R. § 1.65 provides that applications are considered pending until a Commission grant or denial is no longer subject to reconsideration by the Commission or to review by any Court." As detailed in paragraph 2 hereinabove, BEA filed its reconsideration in a timely fashion and is being reinstated *nunc pro tunc* to its mutually exclusive status with Family's proposal. Accordingly, Moody's petition will be denied.

5. *Other matters*. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicants have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by the applicants would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

6. The applicants have not indicated whether an attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49560 (1978). In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement among themselves.

7. Inasmuch as this proceeding involves competing applicants for noncommercial educational facilities, the areas and populations aspect of the standard comparative issue will be modified in accordance with the Commission's prior action in *New York University*, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available noncommercial educational FM signals within the respective service areas.

8. Except as indicated above, the applicants are qualified to construct and operate as proposed. However, since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower heights and locations proposed by the applicants would constitute a hazard to air navigation.

2. To determine (a) the number of other reserved channel noncommercial channel educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channels and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light thereof and pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

3. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), the extent to which each of the proposed operations will be integrated into the overall educational and cultural operation and objectives of the respective applicants; and whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

4. To determine, in the light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That the petition for reconsideration filed by BEA IS GRANTED and its application reinstated *nunc pro tunc*.

11. IT IS FURTHER ORDERED, That the informal objection filed by Isothermal against BEA IS DENIED.

12. IT IS FURTHER ORDERED, That the petition for reconsideration filed by Moody IS DENIED.

13. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

14. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

15. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

16. IT IS FURTHER ORDERED, That the applicants herein, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, 47 U.S.C. § 311(a)(2), and Section 73.3594 of the Commission's Rules, 47 C.F.R. § 73.3594, shall give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of such notice as required by Section 73.3594(g) of the Rules, 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] In order to better utilize the Bureau's limited processing staff resources, the Commission has approved staff consideration and disposition of tenderability and acceptability matters in the context of the relevant hearing designation order rather than in a separate action document. *See Teton Broadcasting*, 1 FCC Rcd 518, 521 n.8 (1986).

[2] Isothermal is the permittee (BPED-840629IB, granted October 8, 1986) of noncommercial educational FM Station WNCW in Spindale, North Carolina.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 87-505

In the Matter of

National Security Emergency
Preparedness Telecommunications
Service Priority System

ERRATA

Released: December 20, 1988

The Commission's Report and Order, and Appendix thereto, in Gen. Docket No. 87-505 (FCC 88-341) released November 17, 1988 are hereby corrected as follows:

Page 22, para. 131 of the REPORT AND ORDER: The effective date is changed from **December 23, 1988** to **December 27, 1988.**

All of the following corrections apply to the APPENDIX - Telecommunications Service Priority (TSP) System for National Security Emergency Preparedness (NSEP):

Page 25, para. 4.a.(1)(a) is changed to read: "(a) Interstate or foreign telecommunications services,".

Also in para. 4.a.(1), in the last paragraph designated "NOTE:", change the last two lines to read: "(b) restoration of services that the selected vendor is able to restore."

In para. 4.b., 6th line, the phrase "a service vendor." is changed to read: "that service vendor.".

Page 26, para. 6.b.(2)(l): The duplicated word "preceding" in the last line is deleted.

Page 27, para. 6.f.(1)(b): Change "Comply with NSEP service by:" to read: "Comply with NSEP service requests by:".

para. 6.f.(2): In the first line, the phrase reading "switched *(e.g.,* cellular)" is deleted. In the penultimate line, the designation "E" in the parenthetical phrase is deleted.

Page 28, para. 7.a.(1): the last two lines are changed to read: "used to satisfy a requirement for provisioning or restoring NSEP services."

Page 31, para. 12.c.(2): The first sentence is expanded to read: "This subcategory covers those minimum additional telecommunication services essential to maintaining an optimum defense, diplomatic, or continuity-of-government posture before, during, and after crises situations."

Page 31: In paras. 12.c.(1) and 12.c.(4), the phrase "few minutes" is changed to read "a few minutes".

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-546

In re Applications of

WEST MECKLENBURG BROADCASTING, INC. (hereafter Mecklenburg) File No. BPH-880107MS

PATRICIA B. WAGSTAFF (hereafter Wagstaff) File No. BPH-880107NH

For Construction Permit
for a New FM Station on Channel 260A
in Chase City, Virginia

HEARING DESIGNATION ORDER

Adopted: November 18, 1988; Released: December 20, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Mecklenburg is the licensee of station WMEK(AM) in Chase City, Virginia, and it has indicated that in the event a construction permit is issued in this proceeding, it will divest of any interest in this station under the following condition: If the Commission awards Mecklenburg preference as the operator of a daytime-only AM station, it will divest itself of any interest in station WMEK(AM) within three (3) years following the grant of the instant application, or as directed by the Commission under its daytime-only preference policy. Accordingly, an appropriate condition will be specified below.

3. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Mecklenburg has filed such statement, it is deficient. Mecklenburg has not listed any minority group as recruitment sources. Accordingly, Mecklenburg will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

4. Mecklenburg has indicated that it will co-locate its antenna on the existing tower of non-directional station WMEK(AM), Chase City, Virginia. According to the Commission's database, the accepted coordinates for this tower are North Latitude 36' 48' 22" and West Longitude 78' 26' 22 ". However, Mecklenburg listed the coordinates of the tower as North Latitude 36' 48' 22" and West Longitude 78' 26' 21". Because the applicant clearly proposes to locate on an existing tower of a Commission licensee, and because specific reference is made to this tower in various places in the application in question, the staff could, "drawing on the application as a whole," confidently verify the transmitter location by taking official notice of the site coordinates as found in the Commission's files for the licensed co-located facility. Accordingly, Mecklenburg was found to be acceptable for filing; however, it shall be required to file a corrective amendment to the application with the presiding Administrative Law Judge within 30 days of the release of this Order.

5. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicant have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Patricia B. Wagstaff would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Patricia B. Wagstaff would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That, in the event of grant of Mecklenburg's application, Mecklenburg will be ordered to divest itself of all interests in and sever all connections with Stations WMEK(AM), Chase City, Virginia prior to the commencement of program test authority.

9. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Mecklenburg shall submit an amended EEO Program information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

10. IT IS FURTHER ORDERED, That Mecklenburg shall submit the corrective amendment called for in paragraph 4 above, with the Presiding Administrative Law Judge within 30 days of the release of this Order.

11. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to the proceeding with respect tot he air hazard issue only.

12. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

13. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

14. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-328

In re Applications of

MAGDALENE GUNDEN PARTNERSHIP	File No. BPCT-850607KK
NORTH BAY TELEVISION, INC.	File No. BPCT-850725LC
MARIN TV SERVICES PARTNERS, LIMITED	File No. BPCT-850725LE

For Construction Permit for a
New Television Station
Novato, California

ORDER

Adopted: November 28, 1988; Released: December 13, 1988

By the Commission:

1. Before the Commission are: (1) Contingent Application for Review filed by North Bay Television, Inc., on October 13, 1987; (2) Application for Review filed by Magdalene Gunden Partnership (Gunden), on November 20, 1987; (3) Application for Review filed by Marin TV Services Partners, Limited, on March 2, 1988; (4) Opposition filed by North Bay on March 16, 1988; (5) Opposition filed by Mass Media Bureau on March 17, 1988; (6) Opposition filed by Marin on March 17, 1988; (7) Petition for Leave to Amend filed by Marin on April 6, 1988; (8) Comments filed by North Bay on April 13, 1988; (9) Motion for Leave to Supplement Application for Review filed by Marin on May 10, 1988; and (10) Opposition and Request for Leave to File filed by North Bay on May 24, 1988.

2. Administrative Law Judge Joseph Stirmer granted North Bay's application based on its 77 percent ownership integration credit compared with 10 percent for Marin. 2 FCC Rcd 1223 (ALJ 1987). The Review Board affirmed the ALJ's initial decision. 2 FCC Rcd 5513 (Rev. Bd. 1987), *recon. denied,* 3 FCC Rcd 488 (Rev. Bd. 1988).

3. We affirm the Board's grant of North Bay's application. However, Marin argues that a recent Commission opinion requires a reversal of the Board's determination in this case. In *Victory Media, Inc.*, 3 FCC Rcd 2073, 2073 ¶ 8 (1988), the Commission, in awarding a voting shareholder 100 percent integration credit, held that a non-voting shareholder's dominant role in securing financing, selecting the voting shareholder, forming the applicant and initiating the application was not necessarily "dispositive of whether the applicant, once established as an ongoing business, will be secretly managed by its passive investors."

4. Marin is a limited partnership in which the general partners, Mary P. Barnard and Gloria C. Williams, own 10 percent of the equity interest and the limited partner, Broadcast Enterprises, Inc. (BEI), owns 90 percent. The Review Board affirmed the ALJ's award of only 10 percent integration credit to Marin because the application was initiated, sponsored, financed, and prosecuted by BEI. 3 FCC Rcd at 5515 ¶ 10. Were the findings relating to the initiation, sponsorship and financing of the applicant by BEI the only facts before us in this case, our holding in *Victory* would require us to review the Board's findings in light of that decision. However, the key finding in this case that distinguishes it from *Victory* is the relationship of the law firm of McFadden, Evans & Sill to the applicant, the general partner, and the limited partner.

5. One of BEI's attorneys, Douglas B. McFadden, was the corporate secretary and a director of BEI. 3 FCC Rcd at 489.¶ 6. After the record in this proceeding was closed, Mr. McFadden resigned his position as secretary and director of BEI in October 1986. *Id.* However, the law firm of McFadden, Evans & Sill has represented Marin in the preparation, filing and prosecution of its application after execution of the limited partnership agreement and, indeed, throughout this proceeding.

6. The Commission has held that the equity interest of limited partners who provide legal representation and counsel to the partnership relating to the "licensing and operation" of the broadcasting applicant is attributable for comparative purposes. *Clarification on Ownership Attribution*, 1 FCC Rcd 802, 804 ¶¶ 15, 16 (1986). Although we stated in that memorandum opinion and order that the application of that holding to comparative hearings was beyond the scope of that proceeding, *id.* at 808 n.40, the holding is consistent with the basic standard for determining the proper insulation threshold set forth in *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 488 ¶¶ 14, 15 (1981), and therefore applicable here. *See Tulsa Broadcasting Group*, 2 FCC Rcd 6124, 6129 ¶ 27 (Rev. Bd. 1987), affirmed, FCC 88-232 (July 23, 1988). Moreover, the fact that the services were provided by Mr. McFadden's firm and not Mr. McFadden himself does not alter the fact that because Mr. McFadden was an officer and director of BEI for nearly a year after this proceeding was designated for hearing, BEI must be charged with the provision of legal services to Marin, and its general partners. *See Tulsa Broadcasting Group*, 2 FCC Rcd at 6130 ¶¶ 29, 30.

7. Based on the totality of the record evidence, we agree that the Board properly refused to alter the ALJ's award of only ten percent integration credit for Marin. *See Signal Ministries, Inc.*, 104 FCC 2d 1481, 1496 ¶ 16 (Rev. Bd. 1986), rev. denied 2 FCC Rcd 1259 (1987).

8. ACCORDINGLY, IT IS ORDERED, That the petition for leave to amend filed April 6, 1988 by Marin TV Services Partners, Limited, IS GRANTED and the amendment IS ACCEPTED.[1]

9. IT IS FURTHER ORDERED, That the motion for leave to supplement application for review filed May 10, 1988 by Marin TV Services Partners, Limited, IS GRANTED.

10. IT IS FURTHER ORDERED, That the Applications for Review filed November 20, 1987 by Magdalene Gunden Partnership and March 2, 1988 by Marin TV Services Partners, Limited ARE DENIED; the Contingent Application for Review filed October 13, 1987 by North Bay Television, Inc. IS DISMISSED as moot; the application of North Bay Television, Inc. (File No. BPCT-

850725LC) for a construction permit to establish a new television station at Novato, California IS GRANTED; and the applications of Magdalene Gunden Partnership (File No. BPCT-850607KK) and Marin TV Services Partners, Limited (File No. BPCT-850725LE) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] Marin's amendment states that N. Richard Miller, president of BEI, is a 25 percent owner of Twenver, Inc., permittee of KTZO-TV, Denver, Colorado.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-201

In the Matter of

Amendment of Section 73.202(b),	RM-5003
Table of Allotments,	RM-5529
FM Broadcast Stations.	
(Walton and Falmouth, Kentucky)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: December 2, 1988; Released: December 13, 1988

By the Chief, Policy and Rules Division:

1. The Commission has before it two petitions for reconsideration of the *Report and Order* in this proceeding, 2 FCC Rcd 419 (1987), *corrected text issued*, 2 FCC Rcd 2049 (1987). The *Report and Order* substituted Channel 245A for Channel 237A at Falmouth, Kentucky, and modified accordingly the license of IOK, Inc., for station WIOK, Channel 237A, Falmouth, Kentucky. The action taken in the *Report and Order* was conditioned on the outcome of a pending petition for review, now before the United States Court of Appeals for the District of Columbia Circuit, of the Commission's actions in Docket 84-231.

2. LM Communications, Inc. (LM), filed one petition for reconsideration. LM objects to the substitution of channel 245A for channel 237A at Falmouth because the substitution would conflict with LM's proposal to upgrade its station WCOS at Paris, Kentucky, from Channel 244A to Channel 245C2. LM has also petitioned the Court of Appeals for review of the Commission's action in Docket 84-231 in an effort to have station WCOS upgraded. IOK, Inc. filed the other petition for reconsideration. IOK objects to the conditioning of the channel change on the outcome of LM's appeal, and advances an alternative proposal to substitute Channel 298A for Channel 237A at Falmouth. The parties filed oppositions and replies. In addition, Radio Cincinnati, Inc., licensee of station WRRM, Cincinnati, Ohio, filed a "Petition Requesting Rescission of Allocation and Designation for Hearing Or, Alternatively, Additional Public Notice and Opportunity for Comment." Radio Cincinnati requests rescission of the allotment of channel 245A to Falmouth, and objects to IOK's alternative proposal. The parties also filed various supplemental pleadings.

3. On September 22, 1988, Amber Broadcasting Corporation, successor in interest to IOK, filed a request for withdrawal of rule making. In its request, Amber states its desire for Station WIOK to remain on Channel 237A, and withdraws its request that Station WIOK be moved to either Channel 245A or Channel 298A. We believe the grant of Amber's request would serve the public interest. Although we have received several petitions requesting alternative uses of Channel 237A since our action in the *Report and Order*, we do not believe those petitions may properly be considered in making our public interest determination. The filing of the petitions for reconsideration stayed the effect of the action taken in the *Report and Order*. *See* 47 CFR § 1.420(f). Therefore, petitioners for alternative uses of Channel 237A filed their petitions at the risk that the channel change at Falmouth might not become effective. Accordingly, we do not believe they are unfairly prejudiced by our action. Moreover, those proposals are currently consolidated with a number of other proposals in MM Docket 88-31. If necessary, we will consider alternative channels or an appropriate order to show cause to Amber designed to accommodate those proposals in the context of that Docket. In light of Amber's request, the relief requested in the petitions for reconsideration and other pleadings is no longer necessary.[1] Accordingly, because the issues in this proceeding are either moot or pending in other proceedings, terminating this proceeding would be conducive to the efficient transaction of Commission business. We will dismiss the petitions for reconsideration and other pleadings, vacate our action in the *Report and Order* modifying the license of Station WIOK, and terminate this proceeding.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 27, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Falmouth, Kentucky	237A

5. IT IS FURTHER ORDERED, That the *Report and Order* in this proceeding IS VACATED.

6. IT IS FURTHER ORDERED, That the Petitions for Reconsideration filed by LM Communications, Inc., and IOK, Inc., and the Petition Requesting Rescission of Allocation and Designation for Hearing Or, Alternatively, Additional Public Notice and Opportunity for Comment, filed by Radio Cincinnati, Inc., ARE DISMISSED.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Karl A. Kensinger, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Bradley P. Holmes
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] In its petition for reconsideration, LM also requested the upgrade of its station at Paris, Kentucky, in the context of this proceeding. Although that request is not mooted by Amber's withdrawal, LM's proposal, in two different forms involving two

different sets of channel substitutions to accommodate its upgrade, is before the Court of Appeals for the District of Columbia Circuit in the context of an appeal of our actions in MM Docket 84-231 and the Commission in MM Docket 88-31. LM's proposals will be disposed of in those separate proceedings.

Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION

Alex D. Felker
Chief, Mass Media Bureau

MM Docket No. 85-38

In the Matter of

Review of the Technical and
Operational Requirements of
Part 76, Cable Television

ORDER DENYING MOTION FOR EXTENSION OF TIME TO FILE COMMENTS

Adopted: December 12, 1988; Released: December 12, 1988

By the Chief, Mass Media Bureau:

1. On December 8, 1988, the County of Fairfax (Virginia), by its Office of the County Attorney, filed a motion requesting that the time within which to file comments to the *Further Notice of Proposed Rule Making* in the above captioned proceeding be extended from December 12, 1988 to December 27, 1988. Fairfax contends that such an extension is needed to provide more time for it to fully analyze the proposed technical standards as they may impact a planned interconnection of two franchised cable television systems within its county. Fairfax also contends that it needs the additional time to fully assess the impact of the proposed rule on subscriber reaction to signal quality degradation.

2. The *Further Notice of Proposed Rule Making*, however, did not propose any rule(s) pertaining to subscriber reaction to signal quality degradation. Moreover, with regard to the impact of the technical standards on the planned interconnection of the two cable systems in Fairfax County, we believe that the initially provided time of 60 days for comments and 30 more days for reply comments is sufficient to permit parties to fully consider such matters. Thus, we will not extend the filing date for comments as requested.

3. Accordingly, IT IS ORDERED that the motion for extension of time filed by the County of Fairfax, Virginia IS DENIED.

4. This action is taken pursuant to authority found in Section 4(i) and 303(r) of the Communications Act of 1934, as amended, and Section 0.283 of the Commission's rules.

5. For further information concerning this proceeding, contact Bernard Gorden, Mass Media Bureau, (202) 632-9660.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

AMERICAN PAGING, INC.
(OF CONNECTICUT)

For authority to construct a new one-way station to operate on 158.10 MHz in the Public Land Mobile Service at Clinton and Trumbull, Connecticut — File No. 20484-CD-P/L-01-87

For authority to construct a new one-way station to operate on 158.10 MHz in the Public Land Mobile Service at Danbury, Connecticut — File No. 20813-CD-P/L-01-87

MEMORANDUM OPINION AND ORDER

Adopted: December 13, 1988; Released: December 21, 1988

By the Deputy Chief, Common Carrier Bureau:

1. Henry M. Zachs, d/b/a Massachusetts-Connecticut Mobile Telephone Company (Zachs) has filed Petitions to Deny the captioned applications of American Paging, Inc. (of Connecticut) (API).[1] Responsive pleadings were filed.[2]

2. In his petitions to deny, Zachs reiterates the arguments set forth in his Request for Investigation and Petitions to Deny filed in opposition to T-Com's request for authorization to assign API the licenses for one-way facilities at Springfield, Massachusetts; Hartford and Northford, Connecticut. Specifically, Zachs argues that T-Com and API sought to transfer control of these facilities through an unorthodox management agreement without prior Commission approval. In addition, Zachs argues that API's proposed facilities will cause objectionable interference to T-Coms' existing facilities at Springfield, Hartford and Northford, and contends that T-Com has consented to accept this interference. The fact that T-Com has consented to this interference, Zachs argues, further substantiates its allegations concerning a premature transfer of control between API and T-Com. In addition, Zachs questions T-Coms' ability to continue to independently and effectively service its subscribers while accepting the objectionable interference.

3. In its opposition, API states that T-Com has not transfered control of the one-way facilities at Springfield, Hartford and Northford to API. In addition, API asserts, Zachs has not demonstrated by engineering affidavit or by other support that the interference from API's proposed facilities will prevent T-Com from providing service. In fact, API contends, its proposed facilities will be operated in conjunction with T-Com's existing facilities so as to maximize the availability of competitive paging service.

4. After review of the relevant case precedent and related pleadings, we find the petitioner's claims to be without merit. First, the allegations raised by the petitioner concerning a premature transfer of control to API were considered and rejected by the Common Carrier Bureau in *T - Com, Inc.*, 3 FCC Rcd 1772 (1988). There, with respect to the Springfield station, the Bureau found that T-Com had not put that station into operation due to lack of state certification (apparently because of opposition from Zachs at the state level). Therefore, the Bureau found that there was no operation to assign under the management agreement. With respect to the Northford station, the Bureau found that T-Com had assumed the normal incidents of control. Specifically, T-Com had secured the sites, negotiated a management contract with API, established the construction schedule and filed the necessary applications for the Northford station.[3] Accordingly, the Bureau found no evidence of an unauthorized assignment of either the Northford or the Springfield licenses, and granted the assignment of these stations to API.[4] Second, Zachs' allegations concerning APIs ability to provide independent service is now moot. Potential interference from API's station is not an issue now that the assignment of the licenses from the Springfield, Hartford and Northford have been authorized and transferred to API.

5. In light of the resolution of Zachs allegations in *T - Com, Inc.*, Zachs failure to demonstrate any additional basis to deny API's applications and our review of the captioned applications, we find API qualified to be a Commission licensee, and that grant of API's applications to be in the public interest.

6. Accordingly, IT IS ORDERED that the application of American Paging, Inc. (of Connecticut), File No. 20484-CD-P/L-01-87 IS GRANTED.

7. IT IS FURTHER ORDERED that the application of American Paging, Inc (of Connecticut), File No. 20813-CD-P/L-01-87 IS GRANTED.

8. IT IS FURTHER ORDERED that the petition to deny the Clinton and Trumbell, Connecticut applications filed by Henry M. Zachs, d/b/a Massachusetts-Connecticut Mobile Telephone Company IS DENIED.

9. IT IS FURTHER ORDERED that the petition to deny the Danbury, Connecticut application filed by Henry M. Zachs, d/b/a Massachusetts-Connecticut Mobile Telephone Company IS DENIED.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective on its release date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Rules may be filed withing 30 days of the date of public notice of this order. *See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Operations
Common Carrier Bureau

FOOTNOTES

[1] Zachs filed the Petition to Deny the Clinton and Trumbull, Connecticut application on December 15, 1986 and filed the Petition to Deny the Danbury, Connecticut application on December 29, 1986. Because of the similarity of the issues presented, we have consolidated consideration of the Petitions.

[2] API filed a Request for Expedited Action on May 13, 1988.

[3] There was no opposition to the assignment of the Hartford, Connecticut station.

[4] The Bureau did find that T-Com violated Section 22.43 of the Commissions rules by not constructing its station within the prescribed time-limit. Accordingly, the Commission granted the assignment of the licenses for the Northford and Springfield stations on the condition that T-Com pay a5000 forfeiture to the Commission prior to consummation of the transaction. The Northford assignment was granted without restriction.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

DOUGLAS R. CASEY File No. 34586-CL-P-173-A-86

For authority to construct and operate a non-wireline cellular system on Frequency Block B in the Domestic Cellular Radio Telecommunications Service to serve the Biloxi-Gulfport, Mississippi MSA

MEMORANDUM OPINION AND ORDER

Adopted: December 12, 1988; Released: December 21, 1988

By the Commission:

1. Douglas R. Casey (Casey) has filed an application seeking Commission review of a Memorandum Opinion and Order (*Order*) released by the Mobile Services Division (MSD), which dismissed the application of Casey and granted the application of William Campbell (Campbell) for authority to construct a non-wireline cellular system in the Biloxi-Gulfport, Mississippi Metropolitan Statistical Area (MSA).[1]

I. BACKGROUND AND CONTENTIONS

2. Casey's application was selected first in the Biloxi-Gulfport, Mississippi cellular lottery. Campbell was the second-ranked applicant.[2] Campbell filed a Petition to Dismiss or Deny Casey's application. Casey filed a reply to the Petition. On October 1, 1987, Campbell withdrew his Petition to Deny stating that an agreement had been reached between the parties. The MSD decided that certain allegations raised by Campbell could not be ignored and proceeded to evaluate the merits of Campbell's Petition. Campbell's petition alleged, *inter alia*, that Casey's application should be denied because it was improperly signed, certified and verified. Campbell stated that the application, certification and verification were signed by Bruce Meadows (Meadows) as "agent" and that Casey made no showing of physical disability or absence from the United States to excuse himself from signing the application. Casey, relying on Section 22.913(b)(3).[3] responded that the application was properly signed, certified and verified by Meadows as an authorized agent of Casey. Casey argued that in the event that Meadow's signature was not permitted, he requested a waiver of the rule and acceptance of the application. In its *Order*, the MSD found that Casey's application (Form 401) violated Section 1.743[4] of the rules and was defective as filed. Since the Form 401 was not properly executed, the application was dismissed.

3. In his Application for Review, Casey argues that (1) the dismissal of his application was based on the MSD's misinterpretation of Section 1.743 of the Commission's rule, (2) he should have been permitted to cure his defect with an amendment, (3) he essentially complied with the rule even though he did not explain his method of compliance in the initial application, (4) there should be no distinction between corporate and individual signature requirements and (5) he should be granted a waiver of the rule because "[a]pplicants can only be expected to know so much, in such a huge body of rules, policies and cases."[5] No opposition to the Application for Review was filed. On September 16, 1988, Casey filed a Request for Stay.[6]

II. DISCUSSION

4. After consideration of the facts and arguments, we deny Casey's Application for Review. The issues raised by Casey in his Application for Review are virtually identical to those raised in his Opposition and Reply to Campbell's Petition to Dismiss or Deny and rejected by the MSD. In that *Order*, the MSD correctly dismissed Casey's application as defective because it was signed by someone other than the applicant in violation of Section 1.743(a) of the rules and because it did not fully comply with the exception set forth clearly in Section 1.743(b) of the rules. If the exception is used, and an attorney signs for an applicant, the attorney must set forth an explanation of why he is signing the application. *Bruce M. Schorsten*, 2 FCC Rcd 5421 (Com. Car. Bur. 1988). In this case, Casey's application was signed on the face of the application, certification and verification by Meadows as "agent." In later pleadings, the applicant made a claim of established residence outside of the United States; yet, on the application itself, there was no evidence that Meadows was an attorney and that he was signing the application because the applicant was a resident of Hong Kong.[7] Meadows' declaration stated only that he was the business manager of Casey. In addition, Casey's application did not include an explanation of why he did not personally sign the application. We find that the MSD did not err in its interpretation of Section 1.743.

5. Equally unavailing is Casey's claim that Meadows signed as an authorized representative and under a power of attorney which should be viewed in the same light as the duly authorized corporate employee who may sign in place of a corporate officer.[8] The corporate application must be signed by an officer or duly authorized employee because a corporate application must be signed by some designated individual. However, there is no reason to designate someone other than the applicant to sign an individual application.

Bruce M. Schorsten, supra; Clyde W. Pierce, 2 FCC Rcd 3522 (Com. Car. Bur. 1987).[9]

6. It has been the consistent practice of the Commission to reject all cellular applications with faulty signatures. *Bruce M. Schorsten, supra*; *American Cellular Network Corporation of Nevada*, 2 FCC Rcd 4530, 4531 n. 2 (1987). Such applications are unacceptable for filing, and may not be amended after the filing date or after the lottery to bring them into compliance with the cellular radio rules. *See Ronald F. Trinchitella*, 3 FCC Rcd 343 (Com. Car. Bur. 1987); *Clyde Pierce, supra*. In the instant case, we

have been presented with no evidence that would distinguish this case from all the other cellular radio cases that have been rejected for failing to comform to the requirements of Section 1.743 and that would warrant us granting a waiver of that rule. Ignorance has never been a viable excuse for not following a Commission rule. As was established in *Ronald F. Trinchitella, supra*, a defective signature cannot be corrected by later filings or amendments. The case in *Trinchitella* also involved an application signed by someone other than the applicant who did not indicate that he was an attorney or explain why the applicant himself was not signing the application. In *Florida Cellcom*, 2 FCC Rcd 7044 (Com. Car. Bur. 1987), we waived Section 1.743 and accepted an improperly signed financial amendment and in *American Cellular Network Corporation of Nevada, supra*, we stated that a new amendment could be submitted to replace an amendment which was improperly signed. However, in both cases, we noted that while an incorrectly signed amendment could be cured by a subsequent amendment, an improperly signed initial application and certification could not be so corrected. *See also Clyde Pierce, supra*.

7. Casey has produced no additional facts or circumstances that warrant granting his Application for Review. The disqualification of Casey's application fully complied with Commission rules and the overall legislative intent of making cellular radio services available to the public in an expeditious manner. The arguments raised by Casey do not warrant a waiver of Section 1.743 or a reversal of the *Order*.

8. Accordingly, IT IS ORDERED, that the Application for Review filed by Casey is DENIED.

9. IT IS FURTHER ORDERED, that the Request for Stay filed by Casey is also DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] 2 FCC Rcd 6414 (Mob. Serv. Div. 1987).

[2] *Public Notice*, Report No. CL-86-339, released August 1, 1986.

[3] Section 22.913(b)(3) specifies the proper form and content of applications for construction permits for initial cellular systems in markets beyond the top-120.

[4] Section 1.743 requires an applicant to sign his or her own application with only one exception. The exception in Section 1.743(b) provides that "[a]pplications, amendments thereto, and related statements of fact required by the Commission may be signed by the applicant's attorney in case of the applicant's physical disability, or in case the applicant does not reside in any of the contiguous 48 states of the United States or in the District of Columbia. *The attorney shall in that event separately set forth the reason why the application is not signed by the applicant.*" (Emphasis added.)

[5] Casey's Application for Review at 8.

[6] *Public Notice*, CL-88-157, released September 1, 1988, granted non-wireline cellular service in the Gulfport-Biloxi, MSA to Daryl Reavis, successor-in-interest to Campbell.

[7] Section 1.743(a) was recently amended to bring Section 1.743(b) into conformity with Sections 73.3513(b) and 1.913(h) of the rules which govern the signing of broadcast and private radio applications, respectively. All of the above-referenced Sections of the rules now allow attorneys to sign applications for applicants who are physically disabled or who are absent from the United States. However, since these Sections of the rules state with specificity that "[t]he attorney shall in that event separately set forth the reason why the application is not signed by the applicant," the outcome of our decision would not have been different had the amended rule been in effect at the time Casey's application was filed. *See* Revision of Section 1.743 of the Commission's Rules and Regulations, 3 FCC Rcd 2443 (1988).

[8] We distinguish the facts in the instant case from those in *Lewiston-Auburn Cellular, Inc.*, 2 FCC Rcd 5546 (1988) where a duly authorized NYNEX employee signed the application for the corporation and we found that NYNEX met the requirements of Section 1.743 (a).

[9] If Casey wishes to change the Commission's rule, the proper method for doing so is to file a request for a rule making under Section 1.401 of the Commission's rules and not through the adjudicatory process.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 88-566

In the Matter of

Amendment of Parts 2 and 90 of the Commission's Rules to provide for stolen vehicle recovery systems	RM-6362

NOTICE OF PROPOSED RULE MAKING

Adopted: December 12, 1988; Released: December 21, 1988

By the Commission:

INTRODUCTION

1. By this action the Commission proposes to modify Section 2.106 of its rules, the Table of Frequency Allocations, by adding footnote US312.[1] Footnote US312 would allocate the frequency 173.075 MHz for stolen vehicle recovery systems. Further, the Commission is proposing to modify Section 90.19 of its rules to provide service rules for these systems.[2]

BACKGROUND

2. On March 10, 1986, the Commission adopted an *Order* granting experimental authority to the Lo-Jack Corporation (Lo-Jack) and the Massachusetts' Department of Public Safety (Department) to operate and conduct a market test in the state of Massachusetts of a stolen vehicle recovery system. [3] The system is known as the Lo-Jack system.[4] Prior to that time the Department had been operating this system experimentally under the auspices of the Federal Bureau of Investigation of the U. S. Department of Justice. The system operates on the frequency 173.075 MHz, which is currently allocated for Federal Government use only. More recently, on October 18, 1988, the Commission granted Lo-Jack authority to expand its experiment to the state of Florida.[5]

3. In response to the March 10, 1986, *Order*, the Commission received petitions for reconsideration from WNEV-TV, Inc. (WNEV-TV) of Boston, Massachusetts, and the Association of Maximum Service Telecasters (MST). WNEV-TV and MST requested the Commission to reconsider its action granting the experimental authorization due to potential interference to TV channel 7 operations. On October 6, 1986, the Commission, by *Memorandum Opinion and Order*, denied these petitions for reconsideration. The Commission stated that Lo-Jack's engineering analysis provided sufficient evidence that there was little risk of interference to TV reception. The Commission further noted that previous activity by Lo-Jack on 173.075 MHz had not resulted in complaints of interference.[6]

4. *The Lo - Jack Petition*. On March 31, 1988, Lo-Jack filed a *Petition for Rule Making* (RM-6362). The petition requests that the Commission allocate the frequency 173.075 MHz nationwide for a new stolen vehicle recovery service and adopt appropriate service rules. Lo-Jack asserts that providing an allocation for stolen vehicle recovery systems will benefit both the private sector and law enforcement agencies. The petitioner states that such systems will greatly aid in securing the return of stolen vehicles in a timely and cost-effective way. Lo-Jack claims that vehicle theft is the second fastest growing area of crime in the United States and notes that between 1973 and 1985, 52 billion dollars worth of motor vehicles were stolen. Lo-Jack also advises that vehicle thefts result in more injuries and fatalities to police officers than any other law enforcement activity. Lo-Jack asserts that if a stolen car is equipped with an activated stolen vehicle recovery unit, a police officer will be aware that the vehicle is stolen and can take appropriate precautions.

5. Lo-Jack states that the test of its stolen vehicle recovery system in Massachusetts has proven very successful. It claims that in less than two years of use the police have recovered well over 100 stolen vehicles and have made arrests in almost one-third of those cases. Further, Lo-Jack reports that in 98 percent of the cases where Lo-Jack units were involved the vehicle was recovered within 24 hours of the theft report. This compares with an overall stolen vehicle recovery rate of only 9 percent.

6. Lo-Jack argues that its operations will not cause interference to TV channel 7. In support of this argument, Lo-Jack submits the results of interference tests conducted before the experimental license was granted. Lo-Jack claims the report shows that, even using the worst case assumptions, interference to the reception of channel 7 would be unlikely. Further, Lo-Jack claims that since it began experimental operations in 1986, no interference has been reported.

7. Lo-Jack asserts that both non-Federal and Federal Government entities should be permitted to operate stolen vehicle recovery systems on 173.075 MHz. The company suggests that non-Government licensing eligibility for this new service should be restricted to state and local law enforcement and public safety agencies. Lo-Jack claims this is necessary because stolen vehicle recovery systems tracking computers and base stations should be in the physical control of law enforcement authorities.

8. *Comments*. The Commission received sixteen comments and two reply comments to the Lo-Jack petition.[7] Most of the comments are from public safety agencies supporting the petition. They argue that stolen vehicle recovery systems will provide assistance in solving motor vehicle thefts, increase the speed of recovery of stolen vehicles, reduce potential damage to stolen vehicles and reduce the degree of danger to public safety officers.

9. Two commenters, the Association of Maximum Service Telecasters (MST) and the Public Broadcasting Service (PBS) oppose the petition. Both are concerned about potential interference to television broadcast operations on TV channel 7. They argue that Lo-Jack's initial showing is not sufficient to support a permanent allocation of the frequency 173.075 MHz to this service. Further, they contend that the lack of consumer complaints is not useful evidence in determining actual interference to television reception. PBS also is concerned about potential interference to future advanced television systems (ATV) from stolen vehicle recovery systems. It argues that even if

current NTSC television is not disturbed by stolen vehicle recovery system operations, future ATV systems may be more susceptible to interference. Both MST and PBS argue that the Lo-Jack petition should be denied until further interference studies have been conducted.

10. In reply comments Lo-Jack and the Associated Public-Safety Officers, Inc. (APCO) oppose MST's and PBS's arguments. APCO maintains that Lo-Jack has provided engineering support for its conclusion that no interference to TV channel 7 would result from operations on 173.075 MHz by stolen vehicle recovery systems. Lo-Jack claims that its initial interference analysis has been proven correct by actual operating experience. Lo-Jack argues that the lack of consumer complaints provides useful evidence that interference does not exist. Further, Lo-Jack points out that Massachusetts TV station WNEV-TV, operating on TV channel 7, was well aware of Lo-Jack's testing and made no complaints of interference. Therefore, Lo-Jack believes that additional studies are unnecessary.

DISCUSSION

11. The Commission believes the development of stolen vehicle recovery systems will be of great benefit to law enforcement agencies and to the public. Therefore, we believe that it is in the public interest to propose an allocation and service rules to accommodate such operations. We wish to make it clear however, that we are proposing to allocate spectrum for a specific type of service and not for a particular manufacturer's system or technology.

12. The frequency 173.075 MHz, requested by Lo-Jack in its petition, is currently allocated for Federal Government use. The Commission's staff has attempted to identify a non-Government frequency in this region of the spectrum that could be used for stolen vehicle recovery systems on a nationwide basis. No non-Government frequencies were found. Due to the potential public benefit of the proposed use, the National Telecommunications and Information Administration (NTIA) has agreed to allow sharing of the frequency with non-Government stolen vehicle recovery systems.[9] While some Federal Government operations will continue on this frequency they are limited and are not expected to infringe on the operation of stolen vehicle recovery systems. However, we note that applications for every non-Government base station operating on this frequency shall require coordination with the Federal Government.

13. We have not been persuaded that the use of 173.075 MHz by stolen vehicle recovery systems will cause interference to TV channel 7 operations. We believe that the likelihood of interference is minimal due to the short duration of transmissions and the low power involved. Further, we note that in the three years that Lo-Jack has been operating its system in the vicinity of a TV channel 7 operation there has been no incident or report of interference from either the TV broadcaster or the viewers. We also note that private land mobile systems have been operating even closer in frequency to TV channel 7 than the frequency requested by the petitioner for stolen vehicle recovery systems.[10] With regard to potential interference to ATV, we note that ATV technology is still in development and it may be several years before it is completed.[11] We do not believe it would be appropriate to withhold the benefits of stolen vehicle recovery systems from the public while ATV systems are being investigated.

14. In view of the above, we are proposing that Section 2.106 of the rules be modified by adding a footnote, US312, to the Table of Frequency Allocations in the 162.0125-173.2 MHz band, to provide for stolen vehicle recovery systems. We also are proposing that Section 90.19 of the rules be modified, as shown below in the Proposed Rule Changes, to provide service rules for stolen vehicle recovery systems. We are proposing technical requirements based on the characteristics of the Lo-Jack System. We propose to limit mobile transmitters to 2 watts power output and base transmitters to 300 watts ERP. We propose that systems be limited to F1D and F2D emission and a maximum authorized bandwidth of 20 kHz. We also propose to limit transmissions to 200 milliseconds every 10 seconds. We believe these requirements are necessary to minimize the risk of interference to TV channel 7 operations. In addition, we propose to restrict licensees of stolen vehicle recovery systems to eligibles in the Police Radio Service. We believe this is necessary as these operations are of a sensitive nature and should be limited to law enforcement activities. To determine the necessary licensing procedures, we request comments on whether two separate licensees can operate base stations in the same geographical area without causing co-channel interference, and also whether each license application should be coordinated by the certified coordinator for the Police Radio Service. We believe that these restrictions will adequately provide for vehicle recovery systems without causing interference to TV channel 7 operations. Comments on these proposed rules are requested.

INITIAL REGULATORY FLEXIBILITY ANALYSIS

I. *Reason for Action*

This action is in response to a *Petition for Rule Making* received from the Lo-Jack Corporation. The petition requests the Commission to amend its rules to provide for stolen vehicle recovery systems. It appears that there would be substantial public benefit by providing for such systems.

II. *Objective*

The objective of this proposal is to provide an allocation and service rules for stolen vehicle recovery systems.

III. *Legal Basis*

The proposed action is authorized under Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i) and 303(r). These sections authorize the Commission to make such rules and regulations as may be necessary to encourage more effective use of radio in the public interest.

IV. *Description, Potential Impact and Number of Small Entities Affected*

This proposal will provide marketing opportunities for radio manufacturers, some of which may be small businesses. Beyond this we are unable to quantify the potential effects on small entities. We, therefore, invite specific comments on this point by interested parties.

Additionally, IT IS ORDERED that the Secretary shall serve a copy of this *Notice* on the Small Business Administration.

V. *Reporting, Record Keeping and other Compliance Requirements*

Other than traditional licensing requirements, no new requirements will be imposed upon the Commission's licensees.

VI. *Federal Rules which Overlap, Duplicate or Conflict with this Rule*

None.

VII. *Significant Alternatives*

There are no significant alternatives which would accomplish our stated objective of providing a nationwide frequency allocation for stolen vehicle recovery systems.

15. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

16. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice & stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

17. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

18. This action is taken pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i) and 303(r). Interested persons may file comments on this proposal. All relevant and timely filed comments, in accordance with Sections 1.415 and 1.419 of our rules and regulations (47 CFR Sections 1.415 and 1.419), will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information is placed in the public file, and provided that the Commission's reliance on such information is noted in its final decision.

19. In accordance with the provisions of Section 1.419 of the Rules and Regulations, 47 CFR Section 1.419, formal participants shall file an original and five copies of their comments and other material. Participants wishing each Commissioner to have a personal copy of their comments should file an original and eleven copies. Members of the general public may express their comments without regard to form (as long as the docket number is clearly stated in the heading). All documents will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters in Washington, D.C. Comments and reply comments will be consider timely filed provided they are submitted on or before **February 10, 1989** and on or before **February 27, 1989**, respectively.

20. For further information concerning this rule making contact Mr. Fred Thomas (202) 653-8112, Office of Engineering and Technology, Federal Communications Commission, Washington, D.C., 20554.

PROPOSED RULE CHANGES

21. Parts 2 and 90 of Chapter I of Title 47 of the Code of Federal Regulations are proposed to be amended as follows:

A. Part 2 - Frequency Allocations and Radio Treaty Matters; General Rules and Regulations.

1. The authority citation in Part 2 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082 as amended; 47 U.S.C. 154, 303, unless otherwise noted.

2. Section 2.106 is amended by adding footnote designator US312 to columns 4 and 5 in the 162.0125-173.2 MHz band and by adding the following footnote to the list of footnotes following the Table:

* * * * *

US312 The frequency 173.075 MHz may also be authorized on a primary basis to non-Government stations in the Police Radio Service (with a maximum authorized bandwidth of 20 kHz) for stolen vehicle recovery systems.

B. Part 90 - Private Land Mobile Radio Services

1. The authority citation in Part 90 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082 as amended; 47 U.S.C. 154, 303, unless otherwise noted.

2. Section 90.19 is amended by adding the frequency 173.075 MHz to the Table of Frequencies in paragraph (d), adding limitation (31) in paragraph (e), correcting several typographic errors in the list of frequencies in paragraph (f)(5)(ii) and adding a new paragraph (f)(7) as follows:

90.19 Police Radio Service.

* * * * *

(d) Frequencies available. * * *

169-172	Mobile	30
173.075	Base or mobile	31
450-470	Fixed	15

* * * * *

(e) * * *

(31) This frequency is subject to the provisions of Sec. 90.19(f)(5)(vii).

(f) Additional frequencies available. * * *

(5) * * *

(ii) * * *

458.0125 - 458.9875
460.0125 - 460.5125
460.5625 - 460.6375
462.9375 - 462.9875
465.0125 - 465.5125
465.5625 - 465.6375

* * * * *

(7) The frequency 173.075 MHz is available only for stolen vehicle recovery systems on a shared basis with the Federal Government. Stolen vehicle recovery systems are limited to recovering stolen vehicles and are not authorized for general purpose vehicle tracking or monitoring. Mobile transmitters operating on this frequency are limited to 2 watts power output and base transmitter are limited 300 watts ERP. F1D and F2D emissions may be utilized within a maximum authorized 20 kHz bandwidth. Transmissions will be limited to 200 milliseconds every 10 seconds. Applications for base stations operating on this frequency shall require coordination with the Federal Government.

* * * * *

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Comments and Reply Comments filed in RM-6362

Comments

Association of Maximum Service Telecasters
Elaine Bloom, Florida House of Representatives
S. L. "Spud" Clements, Jr., Florida House of Representatives
Ed Davis, California State Senate
State of Florida, Department of Highway Safety and Motor Vehicles
Florida Department of State
State of Florida, Office of the Governor
Massachusetts Chiefs of Police Association
Commonwealth of Massachusetts, Department of Public Safety
Commonwealth of Massachusetts, MBTA Police
Town of Medfield, Police Department
State of New Jersey, State Police
New York State Association of Chiefs of Police, Inc.
Public Broadcasting Service
Town of Seekonk, Police Department
Town of Stow, Police Department

Reply Comments

Associated Public-Safety Communication Officers, Inc.
Lo-Jack Corporation

FOOTNOTES

[1] 47 CFR Section 2.106.

[2] 47 CFR Section 90.19.

[3] *See Order* in File Nos. 1562-EX-PL-85 and 1563-EX-PL-85, FCC 86-105 (adopted March 10, 1986).

[4] The Lo-Jack vehicle recovery system consists of a radio receiver-transmitter installed in a hidden location in the motor vehicle; tracking devices mounted in police vehicles; and a computerized network of radio transmitters. When a vehicle equipped with a Lo-Jack device is reported stolen, the vehicle's unique identification code is transmitted on the network. When this signal is received by the stolen Lo-Jack-equipped vehicle, the transmitter portion of the device is activated and begins transmitting its identification code. The vehicle can then be tracked by specially equipped police vehicles. Mobile transmitters operate with 2 watts power output and base stations operate with up to 290 watts ERP. Both use F1D emissions with a maximum 20kHz bandwidth. Vehicle transmissions are of very

short duration (approximately 200 milliseconds every 10 seconds). All the devices operate on the same frequency, 173.075 MHz.

[5] *See* grant of experimental authority to Lo-Jack expanding its test market to the state of Florida. The grant is available for public inspection in the Office of Engineering and Technology, 2025 M St., N.W., Washington, D.C., Room 7322.

[6] *See Memorandum Opinion and Order* in File Nos. 1562-EX-PL-85 and 1563-EX-PL-85, FCC 86-424 (adopted October 6, 1986).

[7] A list of the parties commenting on the Lo-Jack petition is provided in the Appendix.

[8] *See* letter dated August 30, 1988, from Mr. William D. Gamble, Deputy Associate Administrator, Office of Spectrum Management, NTIA, to Mr. William Torak, Deputy Chief, Spectrum Management Division, Federal Communications Commission.

[9] NTIA agreed to the non-Government use of 173.075 MHz for stolen vehicle recovery systems subject to the following restrictions: a) The Federal Government agencies will be allowed to continue to use the channel as they have in the past, i.e., for any operations consistent with the NTIA Manual. Note that there are Government operations already on this frequency which must be taken into account. b) A footnote must be added to the National Table of Frequency Allocations that would provide for the FCC to authorize this frequency on a primary basis to state and local law enforcement agencies for vehicle location and recovery systems.

[10] Specifically, about 6500 land mobile systems are authorized to operate in the 173.2-173.4 MHz band without any restrictions to protect TV channel 7 operations.

[11] We note that the frequency in question here is outside the spectrum allocated for TV broadcasting. At this time we do not anticipate that ATV systems will require greater out-of-band interference protection than currently exists. In any event, if the need arises to provide greater out-of-band interference protection for ATV systems, this issue would need to be addressed for numerous radio services.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Annual 1989 Access
Tariff Filings

Petitions for Waiver
Regarding Proprietary Treatment
of Information Contained In
the 1989 Tariff Review Plan

ORDER

Adopted: December 13, 1988; Released: December 14, 1988

By the Deputy Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On October 3, 1988, the Common Carrier Bureau (Bureau) released the *Cost Support Order*, which established the procedures that certain local exchange carriers (LECs) must follow in submitting the summary cost material to support their 1989 annual access tariff filings.[1] The *Cost Support Order* concluded that no data required by the 1989 Tariff Review Plan (TRP) are proprietary.[2] In response to petitions for waiver of certain TRP requirements filed by several carriers, the Bureau released the *1989 Waiver Order* on December 2, 1988. [3] The *1989 Waiver Order* deferred consideration of several carriers' requests that certain data filed as part of the 1989 TRP be deemed proprietary.[4]

2. Such waivers were requested by the Bell Atlantic Telephone Companies (Bell Atlantic), the Central Telephone Company (Centel), the Cincinnati Bell Telephone Company (CBT), Contel Corporation (Contel), the GTE Operating Companies (GTOC), the Lincoln Telephone and Telegraph Company (Lincoln), the New York Telephone Company and the New England Telephone and Telegraph Company (NYNEX), the Rochester Telephone Corporation (Rochester), the Southern New England Telephone Company (SNET), the Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (US West), and the United Telephone System Companies (United). MCI Telecommunications Corporation (MCI) opposed these waiver requests, and replies addressing the confidentiality issue were filed by CBT, Rochester, SNET, US West, and United.

II. PLEADINGS

3. Carriers requesting waivers of the requirement that TRP data be provided for public disclosure object to disclosure of data required by TRP Charts COS-1(P), COS-1(H), COS-4, COS-7, and COS-8.[5] Chart COS-1 contains summary cost information for the past year cost of service (PYCOS) period as well as the test year. These data are represented by COS-1(H) (historical) and COS-1(P) (prospective), respectively. Chart COS-4 is a "report card" for the 1987 and 1988 test years. Chart COS-7 requires total company cost analysis, including the removal of non-regulated costs, adjustments, and costs subject to jurisdictional separations requirements. Chart COS-8 requires interstate cost analysis, including the allocation of interstate costs among the access elements. Some carriers request permission to omit data they deem confidential from their annual access tariff filings. Other parties propose to submit this information to the Commission but seek confidential treatment pursuant to Section 0.459 of the Commission's Rules, 47 C.F.R. § 0.459.

4. Several carriers seek permission to omit Billing and Collection (B&C) and Interexchange revenue data from Chart COS-1. Centel argues that provision of these data will enable competitors to calculate Centel's rate of return for these services to its detriment. Centel Petition at 10. Centel notes that the Bureau has acknowledged that carriers should not be required to provide rate of return information for unregulated B&C services. *Id.* at n.20 (citing *Cost Support Order* at para. 21 n.29). Contel similarly argues that release of revenue information for "non-regulated" and detariffed services such as B&C and Interexchange could compromise its competitive position. Contel Petition at 3-4.

5. United notes that when the Commission deregulated B&C it recognized that B&C is a competitive service, and contends that provision of B&C data would be confusing and would impose an inordinate burden on carriers. United Petition at 6-7 (citing Detariffing of Billing and Collection Services, CC Docket No. 85-88, Report and Order, released Jan. 29, 1986, at para. 36). These carriers also claim that B&C and Interexchange revenue data are irrelevant. Contel Petition at 4; United Petition at 5. *See also* Centel Petition at 10 (a combined figure for B&C and Interexchange revenues would provide the data necessary for evaluation of rates without jeopardizing the carriers' competitive standing).

6. Some carriers request waiver of numerous TRP requirements, including B&C and Interexchange revenue data.[6] Lincoln seeks to omit certain revenue, tax, and return information. Lincoln notes that it is not required by its state regulators to forecast local and state revenues and has never done so. Lincoln Petition at 2. Moreover, Lincoln argues, its competitors will be privy to its internal business forecasts. *Id.* at 3. Lincoln requests a waiver of the corresponding requirements for Chart COS-1(H). In addition, Lincoln seeks a total waiver of Chart COS-4, or at least certain revenue requirement data. *Id.* Lincoln also seeks waiver of information pertaining to non-interstate access revenues, revenue-based tax data, return, and rate of return data for Chart COS-7, as well as certain non-interstate access revenue and revenue-based tax data specified in Chart COS-8. *Id.* at 4.

7. NYNEX makes similar requests regarding Chart COS-1(P), Chart COS-1(H), Chart COS-7, and Chart COS-8. NYNEX asserts that these data are commercially-sensitive financial data and contends that "[a]lthough the Commission has not requested that the LECs provide revenue data for non-regulated activities on a service-by-service basis, the number of services is few and the aggregation does not provide sufficient protection." NYNEX Petition at 5. NYNEX submits that its waiver requests include revenue figures as well as the associated

income tax, net return, and rate of return figures. *Id.* at 4 n.4. NYNEX does not object to providing the required cost data for non-regulated services and for B&C. *Id.*

8. Although they do not request absolute waiver of proprietary information, several other carriers seek confidential protection for the aforementioned data. CBT requests permission to file two versions of its TRP, a confidential version and a public version. CBT Petition at 13. It asserts that release of detailed investment and expense data for its competitive, non-regulated services, and information associated with state jurisdictions, is not necessary to the evaluation of proposed access rates. *Id.* CBT contends that disclosure of such confidential data would jeopardize its competitive position, and notes that many of the cost items associated with the state jurisdiction are not the same as the costs used at the federal level in the separations process. *Id.* at 13-14.

9. GTOC likewise requests permission to file two versions of its TRP. GTOC deems confidential certain revenue, expense, investment, and related information for competitive and non-regulated services for Charts COS-1(P) and COS-1(H). GTOC also requests such treatment for certain items in Charts COS-7 and COS-8. It argues that this information relates to unregulated business activities, or deals with long-term lease of interexchange facilities or would permit calculation of such data. GTOC Petition at 5. GTOC cites Section 552(b)(4) of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(4), and Section 0.457(d) of the Commission's Rules, 47 C.F.R. § 0.457(d), for the proposition that information likely to cause competitive injury warrants confidential treatment. *Id.* Lincoln also mentions FOIA and Section 0.457(d), but, as indicated above, requests waiver of the requirement that it provide the data rather than confidential treatment, stating that, "if included in the Lincoln Tariff Review Plan, this information will likely be made publicly available." Lincoln Petition at 5.

10. Rochester requests confidential treatment for certain rate-of-return, non-access, cost, revenue, and intrastate information. Rochester Petition at 28. Rochester asserts that since none of this information will involve revenue or cost data for regulated interstate services, non-disclosure will not inhibit the review of Rochester's tariff filing. *Id.* SNET also argues that some of the requested TRP information is irrelevant or proprietary and specifically requests permission to combine B&C and Interexchange costs and to withhold revenue data. SNET Petition at 4. In addition, SNET requests confidential treatment for state, total company, and non-regulated revenue, earnings, and tax data, as well as total historical interstate revenues. *Id.* at 5. SNET avers that it will provide the data necessary to perform an analysis of the Part 36 separations procedures, as well as prospective interstate revenue requirements. *Id.*

11. US West seeks proprietary protection for interstate and B&C revenue data for Chart COS-1(P) and for all of Chart COS-7. US West Petition at 16 & Exhibit II. It argues that unregulated services are highly competitive, and that a carrier's financial information is protected by law under FOIA and Section 0.457(d). *Id.* at 13-15. US West contends that neither Section 202 of the Communications Act nor Section 61.38 of the Commission's Rules, 47 U.S.C. § 61.38, envision disclosure of confidential information. *Id.* at 14-15.

12. Many petitioners cite the *ARMIS Reconsideration Order* as supporting their right to request confidential treatment of certain data. Bell Atlantic states that it assumes that the finding in the *Cost Support Order* is merely a recognition, like that made in the *ARMIS Reconsideration Order* that "it is inappropriate to make sweeping determinations as to confidentiality, and that local exchange carriers are free to request confidential treatment of TRP data pursuant to the Commission's Rules." Bell Atlantic Petition, Attachment A at 2. Bell Atlantic seeks proprietary treatment, however, to the extent that the *Cost Support Order* purports to foreclose the carriers' ability to seek protected treatment, and argues that such a conclusion would contradict the *ARMIS* holding and Section 552(b)(4) of FOIA. *Id.* Similarly, Rochester states that it does not take the statement in the *Cost Support Order* as a definitive ruling. Rochester Petition at 28.

13. If the Bureau denies their requests for waiver of the filing requirement, Contel and NYNEX seek confidential protection for such data. Contel Petition at 4; NYNEX Petition at 5. Contel asserts that to deny its request would contradict the *ARMIS Reconsideration Order*. Contel Petition at 4-5. GTOC likewise asserts that the *ARMIS Reconsideration Order* reaffirmed the right of carriers to file both a public and a confidential version of their data. GTOC Petition at 4. SNET also notes the treatment of confidential information in the ARMIS proceeding. SNET Petition at 5. Lincoln and United observe that the *ARMIS Reconsideration Order* afforded treatment similar to that which they now seek for specific TRP information. Lincoln Petition at 2 n.2; United Petition at 7.

14. The MCI Opposition asserts that competitors will not be able to extract information about any particular product through the data provided in a carrier's TRP. MCI Opposition at 5. Even if these data could be considered proprietary, MCI argues, the public interest necessitates that such data be provided to ensure that the LECs are not cross-subsidizing "their competitive ventures with their regulated core business." *Id.* MCI further asserts that the requested data are already in a highly aggregated format and that it is thus not possible to determine the revenues or expenses associated with any single LEC unregulated service. *Id.* at 7. MCI contends that the Commission needs these data to evaluate the proposed access charges and argues that the waiver of these data requirements would encourage LECs to cross-subsidize between jurisdictions or between regulated and non-regulated accounts so as to maximize profit. *Id.* at 8. MCI concludes that the public interest in obtaining just and reasonable rates outweighs the LECs' claims concerning non-regulated and intrastate data. *Id.*

15. CBT, Rochester, SNET, US West, and United generally reiterate in their replies the arguments raised in their waiver petitions. Rochester submits that inasmuch as its confidentiality request was made pursuant to Section 0.459 of the Commission's Rules, it would not deprive the Bureau of data it needs. Rochester Reply at 11. Rochester argues that since MCI and other interexchange carriers are capable of providing competitive bypass alternatives to Rochester's access services, Rochester should not be compelled to disclose competitively sensitive information to them. *Id.* at 11-12. SNET similarly notes that its request to exclude proprietary data does not purport to limit the Commission's review of data necessary to the tariff review process. SNET Reply at 2; *see also* US West Reply at 6. In addition, US West argues that MCI has misconstrued its

request for confidential treatment and asserts that it has made no all-encompassing confidentiality request. *Id.* at 5-6; *see also* United Reply at 3-4 (reiterates contentions expressed in original waiver petition).

III. DISCUSSION

16. Several of the waiver requests made by the petitioners have been mooted by this Bureau's revision of the TRP charts in the *1989 Waiver Order* and the erratum thereto.[8] In Chart COS-1(P), most of the B&C and Interexchange data requirements to which the carriers object have been populated with "N/A." This includes all revenue information for B&C and Interexchange except Allowance for Funds Used During Construction (AFUDC). Certain tax data and all return data also are no longer required for the B&C and Interexchange categories. In addition, "N/A" is indicated in the revenue fields for columns A through G of Chart COS-1(P), which require, among other things, non-regulated, state, and interstate information. Most tax and revenue data are no longer required for columns A through G, and all items of the Chart COS-1(P) Addendum have been populated with "N/A" except the Interstate, Total Common Line, Traffic Sensitive, Special Access, and Total Access categories.

17. For Chart COS-1(H), revenue information regarding common line support is no longer required, nor is most of the return data to which the petitioners object. In addition, the Chart COS-1(H) Addendum has been deleted. Most annualized test-year forecast revenue requirement data in the other interstate, total interstate, and total company subject to separations columns (D through F) has been waived in Chart COS-4. The *1989 Waiver Order* does not change Charts COS-7 and COS-8.

18. All remaining data required by the 1989 TRP must be filed on or before December 30, 1988. The public disclosure of this information is unlikely to cause competitive harm, and will assist the Bureau in determining whether companies have complied with Part 36 and Part 69 of the Commission's Rules. Suppression of these data would prevent other parties from commenting on the proposed rates, thus depriving the Bureau of a valuable resource in our review of the annual filings.

19. Moreover, the information here at issue is specifically exempt from the confidentiality provisions of the Commission's Rules. Section 0.455(c)(11), 47 C.F.R. § 0.455(c)(11), lists as routinely available for public inspection "[t]ariff schedules . . . filed pursuant to Section 203 of the Communications Act, all documents filed in connection therewith, and all communications related thereto." The Commission noted that this is the case in Western Union Telegraph Company and American Satellite Company, Requests for Inspection of American Telephone and Telegraph Company's Documents, FOIA Control Nos. 85-29 and 85-37, FCC 85-378, Memorandum Opinion and Order, released July 23, 1985 (*Western Union*). *Western Union* held that the Commission's Rules implementing the FOIA exemptions apply only to materials not routinely made available absent "compelling circumstances."[9] In that case, the Commission reversed the Bureau's decision to release certain cost information filed by American Telephone and Telegraph Company (AT&T) as part of a facilities application. The Commission said that the data AT&T submitted indicated what AT&T's costs would be "for particular types of facilities at specified locations."[10]

20. We find no such "compelling circumstances" here. Unlike AT&T's facilities application in *Western Union*, the information required by the 1989 TRP is not disaggregated at a level specific enough to cause competitive harm. Furthermore, *Western Union* noted that AT&T would eventually file a tariff and indicated that it would at that time be required to provide cost data for public inspection.[11]

21. In addition, the petitioners have misinterpreted the *ARMIS Reconsideration Order*. That Order did not invite carriers to file requests for confidential treatment, nor did that Order determine that certain of the requested data were confidential. The *ARMIS Reconsideration Order* merely declined "to determine once for all time whether a particular line or column of data is entitled to confidential treatment."[12]

22. A decision to grant confidential treatment for ARMIS data would not warrant a conclusion that similar data filed in connection with a particular tariff filing should be witheld from persons who may wish to file petitions to reject, investigate, or suspend a tariff. Persons who pay tariff rates have a compelling interest in obtaining access to data that are relevant to the rate computations. The Commission's Rules have recognized that interest by classifying such tariff support material as routinely available for public inspection. ARMIS data serve a different function. The Commission required submission of ARMIS data to facilitate development of an automated data base that may be used for a variety of Commission purposes.

23. Moreover, because the ARMIS reports were not in final form at the time the *ARMIS Reconsideration Order* was released, it was impossible for the Bureau to make any determinations regarding proprietary information. The 1989 TRP charts have been issued in final form. We therefore do not believe that our decision to deny confidential treatment of the specified TRP information contradicts the *ARMIS Reconsideration Order*.

IV. CONCLUSION; ORDERING CLAUSE

24. We therefore deny the petitioners' waiver requests for confidential treatment of cost material filed in support of their 1989 annual access tariff filings. The carriers' petitions do not meet the requirements for grant of a waiver and, in light of the breadth of the waivers requested, our grant of proprietary treatment would effectively undermine the Commission's Rules and the efficacy of the tariff review process. Nor do the petitioners provide a good cause showing of unique or extraordinary circumstances.

25. Accordingly, IT IS ORDERED that the petitions for waiver of the requirements of the Annual 1989 Access Tariff Filings filed November 1, 1988, by the parties identified at para. 2, *supra*, ARE DENIED to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] Commission Requirements for Cost Support Material To Be Filed with 1989 Annual Access Tariffs, DA 88-1554, Order, released Oct. 3, 1988 (*Cost Support Order*).

[2] *Cost Support Order* at para. 45.

[3] Annual 1989 Access Tariff Filings, Petitions for Waiver and Petition for Reconsideration, DA 88-1872, Memorandum Opinion and Order, released Dec. 2, 1988 (*1989 Waiver Order*).

[4] *1989 Waiver Order* at para. 20.

[5] The entire 1989 TRP is included as Attachment D to the *1989 Waiver Order*. Procedures for obtaining copies of Attachment D are delineated in paragraph 65 of that Order.

[6] The requests of those carriers enumerating specific columns and lines of the TRP charts as proprietary data, as well as the Bureau's response thereto, are listed in Attachment A.

[7] Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67, and 69 of the FCC's Rules), CC Docket No. 86-182, 3 FCC Rcd 6375 (1988) (*Armis Reconsideration Order*).

[8] Annual 1989 Access Tariff Filings, Petitions for Waiver and Petition for Reconsideration, DA 88-1939, Erratum, released Dec. 14, 1988.

[9] *Western Union* at para. 8.

[10] *Id.* at para. 10.

[11] *Id.* at paras. 10-11.

[12] *Armis Reconsideration Order*, 3 FCC Rcd at para. 34.

ATTACHMENT A

Specific Requests for Waiver or Confidential Treatment of Information Required in the 1989 Tariff Review Plan

LINCOLN

Waiver Request	Bureau Action
COS-1(P)	
Columns A (Calendar Year 1988 Total), B (Annualized 4/1/89 to 12/31/89 Test Period Total), C (Non-Regulated), D (Other Adjusted), E (Subject To Separations), F (State), G (Interstate), T (Billing and Collection), and U (Interexchange)	
lines 100-170...revenues	(For A-G, all NA; for T,U all NA except for line 140, AFUDC)
300-320...other taxes	(All NA except line 310, other state and local taxes)
350-380...FIT	(For A-F, all NA except line 360, ITC Amorization; no NAs for G, for T and U NA only in line 380, net FIT)
630-670...return data	(For A-G, all NA except line G-630, interstate net return; all NA for T and U)
COS-1(H)[1]	
Columns A (Total), B (Non-Regulated), C (Other Adjusted), D (Subject to	

1 By virtue of the text of Lincoln's argument, it is apparent that Lincoln has misidentified the columns of Chart COS-1(H) which it requests be waived. The references made herein by the Bureau are to the correct items.

Separations), E (State), F (Interstate), S (Billing and Collection), and T (Interexchange)	
lines 100-170...revenues	(NA all columns for Common Line Support, Long-Term and Transitional)
300-320...other taxes	(No NAs)
350-380...FIT	(No NAs)
630-670...return data	(For A-E, all NA; for F, S, and T all NA except line 630, net return)
COS-1(H) Addendum	(DELETED)
COS-1(P) Addendum	
Columns A-G, T, and U (same headings as Chart COS-1(P))	
lines 100-130...revenues	(All NA for A-F; G, interstate revenues, required; all NA for T, U)
COS-4	
Requests total waiver; in the alternative, requests waiver of the following revenue requirement items of Columns D (other interstate) and F (total company subject to separations)	
lines 130-155...annualized test year forecast 4/89 to 12/89	(All NA for D; All NA for F except line 145, Uncollected Revenue, I.D.C., and other revenue adjustments)
240-265...annualized historical period 1/88 to 9/88	(For D, NA only in line 265, access service revenues; all NA for F except line 255, Uncollected Revenue, I.D.C., and other revenue adjustments)

430-455...test year forecast for calendar year 1988	(No NAs for D; all NA for F except line 445, Uncollected Revenue, I.D.C., and other revenue adjustments)
540-565...historical period calendar year 1987	(For D, NA only in line 565, access service revenues; all NA for F except line 555, Uncollected Revenue, I.D.C., and other revenue adjustments)
730-755...test year forecast for calendar year 1987	(No NAs for D; all NA for F except line 745, Uncollected Revenue, I.D.C., and other revenue adjustments)

NYNEX

Waiver Request	Bureau Action
COS-1(P)	
Columns A-E, G, and T	
Lines 100-170b (now 100-172)...revenue data	(All NAs for A-E; no NAs for G; all NAs for T excpet line 140, AFUDC)
300...state and local income tax	(For A-E and T, all NAs; no NAs for G)
320...total other taxes	(For A-E and T, all NAs; no NAs for G)
360-380...FIT	(For A-E, all NA except line 360, ITC Amortization; no NAs for G; no NAs for T except line 380, FIT)
630-670...return data	(All NA except net return, line 630 is required for column G)

COS-1(H)	
Columns A-D, F, S	
Lines 100-170b (now 100-172)	(NA all columns for Common Line Support, Long-Term and Transitional)
300	(No NAs)
320	(No NAs)
360-380	(No NAs)
630-670	(All NA for A-D; all NA for F and S except line 630, net return)
COS-1(H) Addendum	(DELETED)
COS-7 (H) and (P)[2]	
Columns A (Total Solely Assigned), B (Solely Assigned Regulated), C (Solely Assigned Non-Regulated), D (Allocated Regulated), E (Allocated Non-Regulated), F (Total Regulated), G (Total Non-Regulated), H (Adjustments), and I (Subject to Separations)	
Lines 1-42...revenue data	(No NAs)
114-115...state and local income tax	(No NAs)

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2 The column headings for Chart COS-7 have changed since the carriers filed their requests for waiver. The revised column headings are A (Total Directly Assigned), B (Directly Assigned To Regulated), C (Directly Assigned To Non-Regulated), D (Attributed To Regulated), E (Attributed To Non-Regulated), F (Generally Allocated To Regulated), G (Generally Allocated To Non-Regulated), H (Total Regulated), I (Total Non-Regulated), J (Adjustments), and K (Subject To Separations).

118...total other taxes	(No NAs)
125-133...ITC	(No NAs)
193-197...Rate-of-Return data	(No NAs)

COS-8 (H) and (P)

Columns A, C

Lines 185-210...operating taxes and revenue data	(No NAs)

GTOC

Waiver Request		Bureau Action
COS-1(P)		
Column C	Non-Regulated	(NA for all revenues, some other taxes, some FIT)
D	Other Adjusted	(NA for all revenues, some other taxes, some FIT)
E	Sub. to Separations	(NA for all revenues, some other taxes, some FIT)
F	State	(NA for all revenues, some other taxes, some FIT)
G	Interstate	(No NAs except return data in lines 640-670)
T	B&C	(NA for all revenues except line 140, AFUDC; NA for some other taxes, some FIT, some return data)
U	Interstate	(NA for all revenues except line 140, AFUDC; NA for some other taxes, some FIT, some return data)

COS-1(H)[3]

Columns B (Non-Regulated), C (Other Adjusted), D (Subject to Separations), E (State), F (Interstate), S (Billing and Collection, and T (Interexchange)	(NA Revenues for Common Line Support, Long-Term and Transitional)

COS-7

Columns B (Solely Assigned Regulated), C (Solely Assigned Non-Regulated), D (Allocated Regulated), E (Allocated Non-Regulated), F (Total Regulated), G (Total Non-Regulated), H (Adjustments), and I (Subject to Separations)	(No NAs)

Waiver Request	Bureau Action
COS-8	
Columns A (Total Unseparated), B (State), and C (Interstate)	(No NAs)

US WEST

Waiver Request	Bureau Action
COS-1(P)	
Col. G, lines 100, 130-175...Interstate revenues	(No NAs)

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3 By virtue of the text of GTOC's argument, it is apparent that GTOC has misidentified the columns of Chart COS-1(H) which it requests be waived. The references made herein by the Bureau are to the correct items.

Col. T, lines 100, 130-175...B&C revenues	(All NA except line 140, AFUDC)
COS-7	
ALL	(No NAs)

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-382

In re Applications of

WWOR-TV, INC. File No. BRCT-871221KE

For Renewal of License of Station
WWOR (TV), Secaucus, New Jersey

and

GARDEN STATE BROADCASTING LIMITED PARTNERSHIP File No. BPCT-871223KG

and

WHITELY COMMUNICATIONS File No. BPCT-880321KM

For Construction Permit
Secaucus, New Jersey

ORDER

Adopted: December 14, 1988; Released: December 22, 1988

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. On December 1, 1988, Whitely Communications filed a Motion for Acceptance of Appeal, Appeal, and a Motion for Stay. Responsive pleadings were filed by the Mass Media Bureau, and WWOR-TV, Inc.

2. Whitely's pleadings are very similar to pleadings earlier filed by Garden State Limited Partnership, and disposed of by Review Board *Memorandum Opinion and Order*, FCC 88R-66, adopted December 12, 1988. The Board's action there is equally applicable and controlling here.

3. ACCORDINGLY, IT IS ORDERED, That the motion for acceptance of appeal filed by Whitely Communications on December 1, 1988 IS DENIED; and that Whitely's appeal and motion for stay filed on December 1, 1988 ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 88-576

In the Matter of

Amendment of Section 90.235 of the Rules to Permit Secondary Fixed Tone Signaling and Alarm Operations in Part 90 Radio Services. RM-6380

NOTICE OF PROPOSED RULE MAKING

Adopted: December 12, 1988; Released: December 22, 1988

By the Commission:

I. INTRODUCTION

1. The Commission has before it two Petitions for Rule Making, one filed by Forest Industries Telecommunications (FIT),[1] and the other filed by the Manufacturers Radio Frequency Advisory Committee (MRFAC).[2] Both petitioners request that licensees in their respective radio services be permitted to conduct secondary fixed tone signaling and alarm operations (hereafter called tone signaling) similar to those now permitted in the Public Safety and the Power and Petroleum Radio Services under Section 90.235 of the Rules. [3]

2. After examining the merits of the FIT and MRFAC petitions, we have decided to propose greater opportunities for all Part 90 eligibles to engage in tone signaling operations. In this *Notice of Proposed Rule Making* (*Notice*), we propose to extend the secondary fixed use of mobile service frequencies for tone signaling to all Part 90 radio services. We also propose to standardize the duration and number of repetitions for tone signaling messages.

II. BACKGROUND

3. Spectrum allocated under Part 90 is, as a rule, used to satisfy base/mobile dispatch operations. Licensees needing fixed point-to-point operations generally obtain authorizations in the Private Operational-Fixed Microwave Service under Part 94 of the Rules. Tone signaling operations constitute an exception to this allocation policy. Tone signaling has been permitted in the Power and Petroleum Radio Services for more than thirty years. Over that time there have been many proceedings aimed at expanding the scope of tone signaling operations. For example, in 1961, we permitted tone signaling in the Power Radio Service for equipment control and supervision.[4] In 1963, the Police, Fire, and Local Government Radio Services were permitted to employ tone signaling for alarm purposes.[5] Additional uses of tone signaling for alarm and control signal confirmation purposes were allowed in the Power Radio Service in 1964,[6] and in the Police, Fire, and Local Government Radio Services in 1975. Tone signaling was also permitted for the first time in the Highway Maintenance and Forestry Conservation Radio Services.[7] Also, later in 1975, additional tone signaling uses were permitted in the Power and Petroleum Radio Services.[8]

III. THE PROPOSAL

4. As this chronology indicates, we have over the years authorized tone signaling capability in a number of Part 90 radio services to provide various point-to-point alarm and operational functions. Our experience during this time demonstrates that equipment design has advanced sufficiently to permit secondary tone signaling operations without causing significant interference problems to the primary users of these land mobile radio services. Therefore, in light of the FIT and MRFAC petitions, as well as the public benefits that can result from a more widespread availability of this technology, we propose to allow tone signaling capability in not only the Forest Products and Manufacturers Radio Services, but in all Part 90 radio services.

5. First, as to Forest Products Radio Service, the *FIT Petition* states that licensees in this service have a need for tone signaling in both forestry and manufacturing operations. In forestry operations, alarms are needed to warn of forest fires and environmental changes, such as sudden wind shifts or humidity drops, that would increase the danger of fires. Tone signaling for alarm purposes would enable quick responses to prevent or contain forest fires, thus enhancing safety and minimizing damage to timberland. In the manufacture of lumber, plywood, hardboard, and pulp and paper products, tone signaling would be employed for the automatic transmission of alarms indicating equipment or process failures, abnormal changes in the level of water or other fluids that can be critical in pulp and paper production, and alarms from chip bin level indicators. Thus we believe that the availability of tone signaling under Section 90.235 for these purposes would enable Forest Products Radio Service licensees to promote safety and efficiency of operations.[9]

6. Similarly, MRFAC asserts that tone signaling for intruder and fire alarms, indications of equipment and process failures, abnormal conditions, and verification of service restoration would prove beneficial to licensees in the Manufacturers Radio Service.[10] We tentatively conclude, therefore, that both petitioners have demonstrated that the public would realize significant benefits as a result of the availability of tone signaling in these services. We therefore propose to include the Forest Products and Manufacturers Radio Services within the provisions of Section 90.235.

7. In addition, we believe that the benefits of tone signaling are not limited to these proposed or existing users of this operational mode, but can be of significant value to many other private land mobile radio users. For example, alarm operations and equipment control for the prevention and correction of failures in a licensee's system would be beneficial to farm and ranch operations, road construction companies, and mining and fuel pipeline operations, among others. We therefore propose to extend the use of tone signaling to all Part 90 radio services.

8. As noted above, our experience indicates that tone signaling has caused little disruption to land mobile users, primarily because these operations are permitted on a secondary basis, actual transmission time is extremely restricted, and the number of signaling messages generally is small. Moreover, a licensee has significant incentives to minimize any potential interference to its own primary land mobile communication requirements. Thus, this technology generally works well and its expanded availability will not denigrate the availability of primary communications. At the same time, however, permitting tone signaling on heavily congested channels could, in some instances, increase congestion for co-channel operations by either interfering with or reducing the time available for the primary land mobile communications. We expect the operational limitations we discuss in the following paragraphs to minimize any such disruptions. We request comments, however, on the feasibility of extending tone signaling to services with heavily-congested, shared channels.

9. When secondary tone signaling was first permitted, each signaling message was limited to six seconds in duration and could not be repeated more than five times, with no two transmissions commencing in the same sixty second period. These limitations were an attempt to minimize interference to primary land mobile voice operations. In 1975, to foster the implementation of state-of-the-art digital tone signaling technology, the Commission amended the Rules[11] to reduce the message length from six to two seconds, and to limit the message repetition to three times in the Public Safety and Petroleum Radio Services and five times in the Power Radio Service.[12] The Commission stated at the time that technological improvements in equipment or techniques should resolve any problems that may result from shortening the message length. The Commission further indicated that if the two second message length proved to be a problem to licensees, the matter could be re-examined at a later date.[13]

10. The *FIT Petition* requests that, for systems authorized in the Forest Products Radio Service, each transmission for any one alarm, warning, or other purpose be limited to a maximum duration of two seconds and not be transmitted more than three times.[14] The *MRFAC Petition* contends that because of the variety of manufacturing operations, the Manufacturers Radio Service should be permitted five tone signaling repetitions as in the Power Radio Service.[15]

11. Tone signaling capability was extended to certain Part 90 users to fulfill the need for short duration transmissions for specified alarm and signaling purposes. The tone signaling technical standards were tightened as equipment state-of-the-art advanced. Tone signaling was also given secondary status with message length and repetition restrictions to minimize interference to co-channel land mobile voice operations. Experience has proven that the present technical standards have been effective and that there has been a minimum of interference reported between tone signaling and voice operations. We, therefore, propose to retain the two second message length.

12. With respect to message repetition, only the Power Radio Service is now permitted five repetitions of tone signaling transmissions.[16] There have been no reported problems encountered by tone signaling users in the services where the rules allow three repetitions. Our objective in this proceeding is to permit expanded use of tone signaling with minimum impact on primary land mobile use. In view of our proposal to allow a considerable increase in the use of tone signaling, we tentatively conclude that a three message repetition limit is warranted. We believe this limitation will not reduce the reliability of tone signaling while providing further assurance that the expanded use of this technology does not interfere with primary communications. We therefore propose to limit the number of tone signaling message repetitions to three for all systems authorized after the effective date of the adopted rules.[17] Systems in the Public Safety Radio Services authorized prior to June 20, 1975, and in the Power and Petroleum Radio Services authorized prior to June 1, 1976, would be permitted to retain a six second message length with five message repetitions. Systems in the Power Radio Service authorized on or after June 1, 1976, but prior to the effective date of the new rules adopted in this proceeding, would be required to comply with the three message repetition limitation. We request comments as to the impact of this proposal.

13. Section 90.235 of the Rules currently defines specific purposes for which tone signaling may be used in the various radio services. As we are proposing to extend tone signaling to all Part 90 radio services, it would not be practical to define or limit the many potential uses of tone signaling. We, therefore, propose to remove all use limitations and allow tone signaling transmissions that meet the message length and repetition limitations to be utilized for any permissible use consistent with the Rules and essential to the activities of the licensee.

14. The *MRFAC Petition* also requests that language be incorporated into Section 90.235 that would require the use of an automatic shut-down device to prevent no more than five transmissions of two seconds each.[18] The Rules now state that automatic means shall be provided to deactivate the transmitter in the event the carrier remains on for a period in excess of three minutes.[19] This rule serves to protect against an equipment malfunction that causes the r.f. carrier to remain on continuously, creating interference to primary voice communications. We understand that in many tone signaling operations the carrier is turned on only when an alarm or control function is needed and turned off when the transmission is completed. In this case, it is possible that the carrier would be turned on and off, but an equipment malfunction would cause the tone signaling transmission to be repeated continuously until corrective action is taken. MRFAC states that an automatic shut-down device that allows no more than five transmissions of two seconds each is important, particularly when operating sites are in remote locations where it may take hours for maintenance personnel to reach the site. This would prevent a continuously repeated alarm transmission from interfering with primary land mobile operations in a large area for an extended period of time.

15. To prevent situations such as MRFAC describes, we propose to require automatic transmitter deactivation if the r.f. carrier remains on for more than three minutes, or if the tone signaling transmission for the same alarm or control function is repeated more than five times. Thus, a licensee could install automatic transmitter deactivation devices compatible with the type of tone signaling system utilized. While MRFAC has suggested such a requirement and we have included this in our proposal, we

request comments on whether such a requirement is really needed. All proposed rule changes are included in the attached Appendix.

16. An alternative to our proposals for message length, message repetition, and automatic transmitter deactivation would be to remove all operational restrictions on tone signaling transmissions and permit licensees to employ tone signaling on an unrestricted basis. While we believe that our proposed operational standards will minimize problems between tone signaling and primary voice operations, we solicit comments concerning the need for such restrictions on the use of tone signaling.

Initial Regulatory Flexibility Analysis

Reason for action

17. The Commission is proposing these rule changes to allow all Part 90 licensees to utilize tone signaling when required in their system operation. This action will permit greater use of the private land mobile radio spectrum and extend the benefits of tone signaling to more licensees.

Legal basis

18. Sections 4(i), 303(g), 303(r), and 331(a) of the Communications Act of 1934, as amended.

Reporting, recordkeeping and other compliance requirements

19. Sections 90.135(a)(2) and (a)(5) respectively require a modification of a license for a change in the type of emission and a change in the number of fixed stations from that authorized. Licensees desiring to add fixed tone signaling to their systems will therefore be required to file a modification to their existing authorization.

Federal rules which overlap, duplicate or conflict with this rule

20. None.

Description, potential impact, and number of small entities involved

21. The ability to use tone signaling will benefit many licensees by enabling them to better control their business operations with the use of their authorized radio system. The number of small entities that will choose to implement tone signaling operations is unknown. Licensees choosing to implement tone signaling will be required to modify their existing authorizations.

Any significant alternatives minimizing the impact on small entities and consistent with the stated objectives

22. None.

Paperwork Reduction Act Statement

23. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or recordkeeping, labeling, disclosure or record retention requirements, and will not increase burden hours imposed upon the public.

IV. PROCEDURAL MATTERS

24. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex - parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

25. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

26. Authority for issuance of this *Notice of Proposed Rule Making* is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) and 303(r). Interested parties may file comments on or before **February 13, 1989,** and reply comments on or before **February 28, 1989.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that the fact of the Commission's reliance on such information is noted in the report and order.

27. In accordance with the provisions of Section 1.419 of the Commission's Rules, 47 C.F.R. Section 1.419, formal participants shall file an original and five copies of their comments or other materials. Participants wishing each Commissioner to have a personal copy of their comments should file an original and 11 copies. Members of the general public who wish to express their interest by participating informally may do so by submitting one copy. All comments are given the same consideration, regardless of the number of copies submitted. All documents will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters at 1919 M Street, N.W. Washington, D.C.

28. For further information concerning this rule making, contact Eugene Thomson, Rules Branch, Land Mobile and Microwave Division, Private Radio Bureau, Room 5126, Federal Communications Commission, Washington, D.C. 20554, telephone (202) 634-2443.

FEDERAL COMMUNICATION COMMISSION

Donna R. Searcy
Secretary

APPENDIX

47 C.F.R. Part 90 is proposed to be amended as follows:

1. The authority citation for Part 90 continues to read as follows:

Authority: Section 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303, unless otherwise noted.

2. Section 90.235 is revised in its entirety to read as follows:

§ 90.235 Secondary fixed signaling operations

Fixed operations may, subject to the following conditions, be authorized on a secondary basis for voice, tone or impulse signaling on mobile service frequencies above 25 MHz within the area normally covered by the licensee's mobile system. Voice signaling will be permitted only in the Police Radio Service.

(a) The bandwidth shall not exceed that authorized to the licensee for the primary operations on the frequency concerned.

(b) The output power shall not exceed 30 watts at the remote site.

(c) A1D, A2D, F1D, F2D, G1D and G2D emissions may be authorized. In the Police Radio Service, A3E, F1E, F2E, F3E, G1E, G2E, or G3E emissions may also be authorized.

(d) Except for those systems covered under subparagraph (e) of this section, the maximum duration of any non-voice signaling transmission shall not exceed 2 seconds and shall not be repeated more than 3 times. Tone signaling transmissions may be staggered or continuous. In the Police Radio Service, the maximum duration of any voice signaling transmission shall not exceed 6 seconds and shall not be repeated more than 3 times.

(e) For systems in the Public Safety Radio Services authorized prior to June 20, 1975, and in the Power and Petroleum Radio Services authorized prior to June 1, 1976, the maximum duration of any signaling transmission shall not exceed 6 seconds and shall not be repeated more than 5 times.

(f) Systems employing automatic interrogation shall be limited to non-voice techniques and shall not be activated for this purpose more than 10 seconds out of any 60 second period. This 10 second timeframe includes both transmit and response times.

(g) Automatic means shall be provided to deactivate the transmitter in the event the carrier remains on for a period in excess of 3 minutes or if the transmission for the same signaling function is repeated more than five times.

(h) Operational fixed stations authorized pursuant to the provisions of this section are exempt from the requirements of §§ 90.137(b), 90.425, and 90.429.

(i) Base, mobile, or mobile relay stations may transmit secondary tone or impulse signals to receivers at fixed locations subject to the conditions set forth in this section.

(j) Under the provisions of this section, a mobile service frequency may not be used exclusively for secondary signaling.

(k) The use of secondary signaling will not be considered in whole or in part as a justification for authorizing additional frequencies in a licensee's land mobile radio system.

FOOTNOTES

[1] Petition for Rule Making, RM-6380, filed on March 30, 1988, by Forest Industries Telecommunications (*FIT Petition*).

[2] Petition for Rule Making filed by the Manufacturers Radio Frequency Advisory Committee on July 25, 1988 (*MRFAC Petition*). This petition was not assigned a RM number. It addresses the same issues and will be considered concurrently with the FIT petition.

[3] Section 90.235 of the Commission's Rules, 47 C.F.R. § 90.235, permits Public Safety, Power, and Petroleum Radio Service licensees to use their mobile service frequencies for separate fixed station operation for specified tone signaling and alarm purposes on a secondary, non-interference basis. Tone signaling is used for functions such as alarms to indicate types and locations of equipment malfunctions, verifying equipment operational status, and detection of intruders and hazardous conditions. The rule specifies that the duration of any one non-voice signaling transmission shall not exceed two seconds and shall not be transmitted more than three times in the Public Safety and Petroleum Radio Services, and five times in the Power Radio Service. It also states that in addition to tone signaling, voice signaling for alarm purposes will be permitted only in the Police Radio Service.

[4] Report and Order, Docket No. 13812, 42 F.C.C. 1081 (1961).

[5] Report and Order, Docket No. 14424, 28 Fed. Reg. 7945 (1963).

[6] Report and Order, Docket No. 15427, 42 F.C.C. 1191 (1964).

[7] Report and Order, Docket No. 19662, 40 Fed. Reg. 21733 (1975).

[8] First Report and Order, Docket No. 19790, 40 Fed. Reg. 59742 (1975).

[9] *See FIT Petition* at page 3.

[10] *See* Comments of MRFAC, RM-6380, at pages 2 and 3.

[11] *See* Report and Order, Docket 19662 at paragraph 10 and First Report and Order, Docket 19790 at paragraph 6. Paragraph 10 of Docket 19662 also stated that the alarms could be staggered in order to improve the possibility of reception, or they may be continuous. We propose to retain this option.

[12] Systems authorized prior to June 20, 1975 in the Public Safety Radio Services, and prior to June 1, 1976 in the Power and Petroleum Radio Services, are permitted to retain the initial tone signaling standards i.e., a message length of six seconds that can be transmitted up to five times.

[13] First Report and Order, Docket No. 19790, 40 Fed. Reg. 59742 at paragraph 9 (1975).

[14] The two second duration and three repetition limitations are the same as now permitted in the Public Safety and Petroleum Radio Services. *See* §§ 90.235(c)(4) and (c)(5).

[15] *See* § 90.235(c)(6).

[16] We believe this exception is the result of an oversight. In the First Report and Order of Docket 19790, we stated in paragraph 7 that we would adopt the suggestion that three repetitions of messages be allowed. The rules that were adopted, however, inadvertently permitted the Power Radio Service five repetitions.

[17] The three tone signaling transmissions for any one event may be repeated at any interval to improve the possibility of reception, or may be continuous at the option of the licensee.

[18] *See* MRFAC Petition at page 5.

[19] *See* § 90.235(c)(10).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

NEVADA BELL File Nos. 4521-CF-P-88 through 4552-CF-P-88

For Construction Authorizations in the Point-to-Point Microwave Radio Service and Request for Waiver of the Rules

MEMORANDUM OPINION AND ORDER

Adopted: December 6, 1988; Released: December 8, 1988

By the Chiefs, Common Carrier Bureau and Mass Media Bureau:

1. Nevada Bell has filed the above-captioned applications to construct and operate 32 microwave radio stations for the provision of telephone service to remote and isolated areas of the state of Nevada. It also has filed a request for waiver of the Commission's Rules to use frequencies allocated to the Instructional Television Fixed Service (ITFS) to provide the telephone service proposed.

2. The subject applications and waiver request were filed with the Commission on April 6, 1988, and placed on Public Notice as Accepted for Filing on April 13, 1988. The mandatory 30-day public comment period passed without any objections or comments being filed. The Governor of Nevada, however, submitted informal comments in a letter dated June 9, 1988, supporting Nevada Bell's proposal and requesting that its applications and waiver request be granted. Then, on August 24, 26 and September 13, 1988, informal objections to Nevada Bell's applications and waiver requests were filed, respectively, by International Mobile Machines Systems (IMM), the Network for Instructional TV, Inc. (NITV) and collectively by the Association for Continuing Education, the Catholic Television Network-Bay Area, the Trustees of Leland Stanford Junior University, Indiana Higher Education Telecommunications System and TransVideo Communications, Inc. (Educators). Thereafter, the Community Telecommunications Network the Archdiocese of Los Angeles, The Diocese of Orange and the Diocese of San Bernandino (Joint Opponents) filed informal objections on October 3, 1988. IMM filed additional comments on October 14, 1988. The South Carolina Educational Television Commission (SCETV) submitted informal comments on October 21, 1988. These were followed, on October 24, 1988, by an informal objection tendered by KLVX, Las Vegas, Nevada (KLVX), and finally by comments filed by the University of Nevada-Reno (the University) on October 28, 1988.

3. IMM is a radio telephone equipment manufacturer whose product line includes "Ultraphone System", the only radio system, we are told, currently designed to utilize frequencies assigned to the recently created Basic Exchange Telecommunications Radio Service (BETRS). *See, Report and Order in CC Docket No. 86 - 495*, 3 FCC Rcd 214 (1988). Most of the commentors and objectors are ITFS licensees.

APPLICATIONS AND WAIVER REQUEST

4. Nevada Bell, a wholly-owned subsidiary of Pacific Telesis, is a common carrier that is certified to provide telephone exchange service to portions of the state of Nevada. It currently has approximately 200,000 access lines installed, most of which are located in and around Reno, Carson City and Incline Village. It has a remaining 20,000 lines which provide telephone service to non-urban areas of the state. In its applications, Nevada Bell states there are approximately 600 people located in outlying rural areas throughout its service area that it is unable to provide service to because of the prohibitive cost of extending service to isolated regions using conventional means, i.e., wireline telephone facilities or very high frequency (VHF) radio loop facilities.

5. In order to extend cost efficient telephone service to these presently unserved locations, as well as to improve service to rural areas now receiving some service, Nevada Bell says some form of point-to-point or point-to-multipoint radio transmission facility is required. It states that the system must have sufficient bandwidth to provide voice and data transmission and control/monitoring functions. It also claims that because the areas to be served are located at great distances from the control office, are often separated by mountainous terrain and are without electric power, an integrated system of unattended repeater facilities that is able to function independently by utilizing their own source of solar generated electricity is essential.

6. Nevada Bell explains that it has surveyed all of the latest available common carrier microwave services and has found that none meets the perceived requirements for providing cost-efficient telephone service to the remote locations of rural Nevada. All are too expensive, ill-suited or still in the experimental stage of development.[1] Therefore, Nevada Bell proposes to utilize frequencies allocated to ITFS.[2]

7. The system proposed by Nevada Bell is described as a hybrid radio loop system that will utilize the D and G channel groups of the 2500-2690 MHz band. It will employ existing equipment manufactured by SR Telecom, Inc. (SRT) of Quebec, Canada, which, Nevada Bell says, offers a state-of-the-art, demand assigned multiple access, time division multiplexing system that is widely used throughout the world, including rural areas of Texas and New Mexico. [3]

8. The SRT equipment, explains Nevada Bell, provides an excellent grade of service for voice, data and control/monitoring of communications and is able to serve up to 94 single-party subscribers on 15 channels using only one transmit-receive frequency pair. It is specifically designed to provide urban quality telephone and data service to isolated rural subscribers using self-contained, solar powered, weatherproof outstation repeaters capable of point-to-point and point-to-multipoint operations. In addition, because of the equipment's high antenna gain design, it requires lower transmitter power output, which reduces the requirement for primary and backup power, eases intersystem and intrasystem frequency coordination problems, and allows frequency reuse at shorter ranges. Reduced power consumption has the added benefit of reducing the incidence of equipment failure. Consequent-

ly, says Nevada Bell, the ability to function independently as an integrated system of repeaters makes the SRT system an ideal technical solution for inaccessible rural areas.

OBJECTIONS AND COMMENTS

9. IMM opposes Nevada Bell's waiver request, contending that it contains substantial errors of fact regarding the cost and technical capabilities of IMM's equipment. IMM submits that its BETRS - compliant equipment, which was specifically created in order to accommodate the telephone needs of rural customers, is a superior alternative to the Canadian equipment that Nevada Bell is seeking authority to use. IMM says that its equipment, contrary to an assertion made by Nevada Bell, is not in an experimental state of development. It is fully type-accepted by the FCC and the Rural Electrification Administration (REA). Furthermore, says IMM, its equipment has had an excellent record of reliability in desert, semi-desert and mountainous locations since 1986. IMM also proffers figures indicating that its system would cost approximately 49 percent less than the one proposed by Nevada Bell, and its equipment, says IMM, includes special features such as custom calling, and will soon also include coin and other data and facsimile services. Finally, IMM says its equipment is much more spectrally efficient than the SRT equipment, which creates less than 3 duplex telephone circuits per MHz of spectrum, whereas the IMM BETRS system creates 80 telephone circuits per MHz. IMM concludes that there is no need to grant Nevada Bell's waiver request.

10. NITV, the Educators, the Joint Opponents, SCETV, and KLVX express nearly identical concerns. They oppose Nevada Bell's waiver request because, in their view, its grant would result in a *de facto* reallocation of ITFS frequencies to basic exchange telephone service at the expense of education. ITFS, says NITV, has already suffered through the allocation of ITFS frequencies for pay television usage, and both NITV and the Educators maintain that there is no need to deplete further the only portion of the spectrum reserved for instructional television when there appears to be alternative methods and technology capable of providing the radio telephone service proposed by Nevada Bell. The University, however, endorses Nevada Bell's proposal.

11. In response to the objections, Nevada Bell submits that the system it proposes will best serve the needs of its subscribers, and its very limited use of the ITFS band will not hinder the foreseeable growth of instructional television.[4]

12. Regarding the relative merits of SRT and IMM equipment, Nevada Bell says that its waiver request was considered carefully, and it was only after a detailed review of various equipment, including that of IMM, that it finally decided that the 2.6 GHz radio system built by SRT was best suited to provide telephone service to outlying areas of Nevada. IMM's equipment, says Nevada Bell, is not suitable or cost efficient for the application envisioned.

13. Nevada Bell does not dispute the spectral efficiency of IMM's equipment, however; it takes issue with IMM's cost estimation, stating that it does not take into account all necessary cost considerations for a system designed for the coverage area and customer needs of Nevada Bell's proposed service area. IMM's estimate, Nevada Bell says, has also omitted numerous subscriber locations beyond a 40-mile radius. Likewise, despite IMM's assertion that a single base station would serve the proposed service area, an additional base station, says Nevada Bell, would be needed. It believes these additional expenses would make a system utilizing IMM equipment 30 percent more expensive than one utilizing SRT equipment. Furthermore, adds Nevada Bell, an IMM system would still lack essential features such as coin service, and data and facsimile services, which a SRT system provides. Consequently, concludes Nevada Bell, the equipment provided by SRT is the only system presently capable of permitting reasonably priced telephone service to rural subscribers.

14. Addressing the concerns expressed by NITV and the Educators, Nevada Bell says that it has no desire to usurp frequencies which could be used by ITFS users. It says that it has demonstrated in its waiver request that its use of ITFS frequencies would be limited to isolated rural areas where there is no apparent interest to provide instructional television in the foreseeable future. Nevertheless, says Nevada Bell, should an ITFS provider emerge in these rural areas, there are sufficient frequencies available for both services to co-exist.

DISCUSSION

15. It is axiomatic that provision of basic telephone service promotes the public interest. But the issue before the Commission in spectrum allocation matters is whether the proposed use has a relatively greater value to the public than other potential uses.[5] In this case the question is whether the system proposed by Nevada Bell is the most cost effective use of ITFS channels in the region from a public interest perspective.

16. It seems clear that some form of radio transmission would be required to provide initial or improved service to those people in the outlying portions of Nevada Bell's service area. Nevada Bell has surveyed all the common carrier radio services, and concluded that none meets its requirements as well as the proposed alternative. It appears doubtful that Rural Cellular Radio Service carriers will extend cellular coverage to these remote, sparsely populated areas, Mobile Satellite Service is not yet a reality, and MMDS does not provide adequate transmit and receive frequency spacing.

17. Also, the only existing technology utilizing the shared VHF frequency band allocated to BETRS appears to be ill-suited for the task at hand. Nevada Bell estimates that the system it proposes, in Nye and Lander Counties, will cost approximately 1,016,700, a savings of approximately 29.6 percent over a BETRS system (1,444,300) and 44.8 percent over a conventional wireline system (1,842,700). Its savings in investment, operations and maintenance costs, it says, would be approximately7,375 per subscriber. We acknowledge that Nevada Bell's estimates and conclusions on the cost and features of the IMM BETRS equipment are the subject of some dispute. Nevertheless, we are disposed to defer to Nevada Bell's judgment in this instance. It has both access to the most recent and reliable information and the incentives to act on that information correctly.

18. It also appears that the cost to consumers of using ITFS frequencies for this particular application are virtually nil. Nevada Bell has also demonstrated that the frequencies sought are vacant and that its limited use of the ITFS spectrum does not pose a threat to present or future instructional television. Its frequency search has revealed

that there are no ITFS or Multipoint Distribution Service facilities using the 2500-2690 MHz band within 50 miles of Nevada Bell's proposed service area. Nevada Bell states that it is aware of only three ITFS licenses issued within 150 miles of its proposed telephone system. The three proposed facilities are licensed to the University of Nevada at its Reno, Carson City and Garnerville campuses and they will operate on the A, B and C channel groups, rather than the D and G channel groups proposed by Nevada Bell. The output power of Nevada Bell's transmitters will be only two watts, and there is virtually no chance they would cause interference to the University's stations. Finally, the University has specifically stated that it has no objection to Nevada Bell's proposal to use the Group D and G frequencies since there is sufficient spectrum to accommodate the frequency needs of Nevada Bell and the University of Nevada.

19. In light of the facts presented, we find that grant of Nevada Bell's applications and waiver request to use frequencies in the 2500-2690 MHz band presently allocated to ITFS would serve the public interest. However, we view the circumstances in this proceeding to be virtually unique and we caution carriers not to consider this decision as an invitation to use unoccupied portions of 2500-2690 MHz spectrum for the provision of common carrier services. Carriers seeking to expand or upgrade rural telephone service are generally expected to utilize those frequency bands that have been allocated specifically for common carrier use. In other cases where the relevant costs and benefits are not so easily ranked, a similar conclusion might not be reached even if the proposal would in fact enhance consumer welfare.

20. Accordingly, IT IS ORDERED, that the informal objections filed by IMM, NITV, the Joint Opponents, the Educators and KLVX ARE DENIED.

21. IT IS FURTHER ORDERED, that the requested waiver[6] and the above-captioned applications ARE GRANTED, subject to the condition that the radio equipment proposed in these applications meet the Commission's type acceptance requirements within 120 days.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Vaughan
Deputy Chief Operations
Common Carrier Bureau

Alex Felker
Chief, Mass Media Bureau

FOOTNOTES

[1] The services examined were Rural Cellular Radio Service, Mobile Satellite Service, Multichannel Multipoint Distribution Service (MMDS), BETRS and VHF Improved Mobile Telephone Service.

[2] This group of frequencies occupies the 2500-2690 MHz band, which is divided into thirty-one 6 MHz channels that are assigned to seven four-channel groups and to one three-channel group designated Group A through Group H. ITFS has exclusive use of A, B, C, D and G Groups and it shares, in varying degrees, the remaining channel groups with the Multipoint Distribution Service (E and F Groups) and the Private Operational Fixed Microwave Service (Group H). *See* Amendment of Parts 2, 21, 74, and 94 of the Commission's Rules in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, 94 F.C.C.2d 1203 (1983), *reconsideration denied*, 98 F.C.C.2d 129 (1984).

[3] Use of this system was approved by the Commission in Big Bend Telephone Company, Inc., 2 FCC Rcd 2413 (1986) (*Big Bend Telephone*).

[4] Nevada Bell's opposition directly addresses only the pleadings submitted by IMM, NITV and the Educators.

[5] *See*, Big Bend Telephone, *supra;* Tele-Media Company of Key West, 74 FCC 2d 554 (1979). *See also* Satellite Television Service, Inc. 87 FCC 2d 598 (1981); American Microlert, Inc., 77 FCC 2d 183 (1980); Television Enterprises, Inc., 68 FCC 2d 1268 (1978); and Teleprompter of Ukiah, 68 FCC 2d 866 (1978).

[6] The waiver granted herein includes waivers of such rules as are necessary to operate the system described in the applications.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Deferral of Rate of Return Represcription Filings Pursuant to Section 65.102(c) of the Rules — AAD 8-1930

MEMORANDUM OPINION AND ORDER

Adopted: December 5, 1988; Released: December 2, 1988

By the Deputy Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In separate petitions filed October 6, 1988, the Ameritech Operating Companies (Ameritech) and BellSouth Corporation (BellSouth) request the Commission to extend the date by which certain carriers must file rate of return submissions pursuant to Section 65.102(c) of the Commission's Rules.[1] Ameritech requests that the filings be deferred until 90 days after release of a final *Report and Order* in CC Docket No. 87-463. The Commission has proposed revisions in rate of return represcription procedures in that proceeding. BellSouth asks that the filings be deferred until June 30, 1989. Both petitioners also request an extension of the time period during which the current rate of return prescription for local exchange carriers (LECs) would be in effect. BellSouth asks that the prescription period be extended until July 1, 1990. Ameritech seeks an extension until a represcription under the revised rules is completed.[2]

2. For the reasons set forth below, we defer the rate of return filing date until June 30, 1989. The request to extend the rate of return prescription period will be addressed in a subsequent order.

II. BACKGROUND

3. Part 65 of the Commission's Rules [3] establishes interstate rate of return prescription procedures and methodologies. Section 65.102(c) governs the timing by which carriers must file their rate of return submissions with the Commission. The rule designated February 3, 1986, as the date carriers were to file their initial rate of return submissions. Thereafter, carriers are required to file rate of return submissions in two year intervals.[4] The second submissions were due to be filed on January 4, 1988.[5]

4. In late 1987 the Commission issued a *Notice of Proposed Rule Making* in CC Docket No. 87-463,[6] proposing changes in procedures and methodologies for setting interstate rates of return in light of experience with the initial represcription and changes since that time. The *NPRM* raised numerous issues with respect to the represcription process. After reviewing comments from interested parties, the Commission concluded that a one-time extension of the current prescription period to include 1989 was required.[7] Accordingly, the Commission suspended Section 65.102(c) for a period of one year, so that carriers could file rate of return submissions on January 3, 1989, rather than January 4, 1988.[8]

III. AMERITECH'S PETITION

5. Ameritech requests that the Commission postpone the January 3, 1989, filing date for rate of return submissions until 90 days after the Commission releases a final *Report and Order* in CC Docket No. 87-463. In support of its petition, Ameritech states that "[t]he same considerations that prompted the Commission to defer the 1989 represcription are present with respect to the 1990 represcription."[9] Ameritech asserts that necessary refinements to the rate of return formula rules have not been adopted. Ameritech observes that in the *NPRM* the Commission voiced concern over flaws in the current rate of return procedures and methodologies, and stated its intention to refine the Part 65 rules prior to the next represcription proceeding to incorporate improvements for future rate of return proceedings.[10] Since the Commission has not yet adopted the intended refinements to the current rate of return formula rules in CC Docket No. 87-463, Ameritech urges postponement of the upcoming January 3, 1989, filing date.

6. Ameritech asserts that going forward with a represcription based on the impending January 3, 1989, filing deadline " . . . would put the Commission in the untenable position of either (a) revising the 12% return based on admittedly flawed formulas, or (b) applying revised rules in the represcription proceeding without giving the RBOCs a prior opportunity to provide comments."[11] Ameritech contends that the Commission should complete the revision of the rate of return rules in CC Docket No. 87-463, and then represcribe the authorized return based on the modified formulas. Thus, Ameritech suggests that deferral of the filing date for rate of return submissions until 90 days after a final *Report and Order* in CC Docket No. 87-463 will enable carriers to file submissions in accordance with revised, improved rate of return rules.

7. Ameritech also claims that the current 12% prescription for local exchange carriers continues to be viable.[12] Ameritech contends that the cost of capital has increased since the Commission prescribed the 12% overall return for LECs in 1986. Ameritech notes the Commission's emphasis on the relationship between interest rates and the cost of equity in the *Deferral Order*.[13] Ameritech submits data to show that interest rates today are higher than in 1986 when the Commission prescribed the 12% return, and in early 1988 when the Commission deferred represcription. Ameritech thus suggests that a 12% return under current conditions is likely to be below the range of reasonableness. Ameritech states that the Commission should not simply continue the 12% return for another year. Rather, in requesting that carriers make their initial filings 90 days after the Commission releases revised rate of return rules, Ameritech impliedly seeks an extension of the current rate of return prescription until the represcription is completed.

IV. BELLSOUTH'S PETITION

8. In contrast to Ameritech's petition to postpone rate of return filings until 90 days after the revised Part 65 Rules are published, BellSouth requests a six month postponement of the filing date and a corresponding six month extension of the current prescription period. BellSouth seeks a deferred filing date of June 30, 1989, and an extension of the existing rate of return prescription until July 1, 1990.

9. BellSouth offers four main contentions in support of its petition. First, it asserts that literal compliance with the Part 65 Rules as currently written is impossible, because certain financial data required by the rules, such as data for the fourth quarter of 1988, will not be available by the January 3, 1989, filing date.[14] Next, BellSouth mirrors Ameritech's petition for postponement of the filing date by stating that the Commission should delay the required filing until the revision of the Part 65 Rules now underway is completed.

10. Further, BellSouth suggests that the proposed delay in the filing of rate of return submissions will facilitate coordination with the new access tariff filing schedule. BellSouth notes that the Commission recently revised Section 69.3 of the Rules to provide that annual revisions to the LECs' access tariffs are to become effective July 1, rather than January 1, beginning in 1990.[15] BellSouth contends that a delay in the filing of the rate of return submissions from January 3, 1989, to June 30, 1989, will permit the represcription process to be concluded in time to incorporate any revisions to the authorized rate of return in the March 31, 1990, annual access tariff filing.

11. Finally, BellSouth asserts that ratepayer interests are adequately protected under the existing authorized rate of return. BellSouth submits that current measurement of the indicators of the cost of capital reveal that capital costs have not changed sufficiently since the last represcription to warrant a new represcription at this time. Noting the current upward trend in interest rates, BellSouth provides calculations under risk premium and capital asset pricing model (CAPM) methodologies to show that the current rate of return is within the zone of reasonableness. BellSouth concludes that no harm to ratepayers would result from an extension of the existing 12% rate of return prescription for an additional six months.

V. PARTIES' COMMENTS

12. Nine parties filed comments in this proceeding.[16] With one exception, the commenters support the Ameritech and BellSouth petitions, or some variation of the two proposals. Of the eight parties commenting favorably, all eight support deferral of the January 3, 1989, filing deadline for rate of return submissions. Further, seven of the eight support some extension of the existing rate of return prescription period due to expire at the end of 1989. For the most part, these commenters echo the arguments advanced by Ameritech and BellSouth. Accordingly, it is not necessary to discuss their comments in detail. Rather, we will briefly summarize the position of each of those eight parties with respect to deferral of the filing deadline and extension of the current rate of return prescription.

13. U S West favors Ameritech's proposal to defer the filing date until 90 days after the Commission releases a final *Report and Order* in CC Docket No. 87-463, and favors extending the current 12% rate of return until revised formulas are promulgated.[17] Bell Atlantic also favors Ameritech's proposed deferred filing date and extension of the currently authorized prescription until the rate of return rules are revised.[18] SNET favors the Ameritech proposal, but states that the Commission should defer the submission of all data at least until BellSouth's proposed June 30, 1989, filing date.[19] Similarly, Southwestern Bell agrees that the six month postponement suggested by BellSouth should be the minimum delay granted, but contends that Ameritech's indefinite deferral of the filing date and extension of the current prescription period is the most reasonable response.[20] USTA also supports Ameritech's proposed postponement of the due date for rate of return submissions, but states that in no case should carriers be required to file their submissions prior to June 30, 1989, even if a final *Report and Order* in CC Docket No. 87-463 is released before March 31, 1989. USTA also supports an extension of the current prescription period until July 1, 1990.[21]

14. NYNEX supports Ameritech's proposed deferral of the rate of return submission, and urges extension of the current prescription period at least until July 1, 1990, in order to coordinate the represcription with the new effective date for annual interstate access tariff filings.[22] The Pacific Companies also favor Ameritech's proposed filing date, and propose a modified version of BellSouth's prescription extension. Pacific proposes that a represcribed rate of return become effective on July 1, 1990, only if refined represcription procedures are in place and represcription is completed in sufficient time to allow LECs to incorporate any subsequently represcribed rates of return into their initial 1990 annual access tariff filings. The Pacific Companies state that if this is not possible any newly prescribed rate of return should become effective on an appropriate date following completion of both CC Docket No. 87-463 and the subsequent represcription.[23]

15. AT&T borrows from both the Ameritech and BellSouth proposals in asking for its own waiver of the January 3, 1989, filing deadline.[24] AT&T seeks deferral of its rate of return submission until at least June 30, 1989, or 90 days after the Commission has issued its decision in CC Docket No. 87-463, whichever is longer.[25] However, unlike the other parties who support the petitions, AT&T asserts that there is no need at this time for the Commission to consider extending the current prescription period for AT&T.[26] In reply, BellSouth concurs with AT&T's request to defer the AT&T filing deadline, but believes that in order to avoid uncertainty, it is appropriate to extend the current rate of return prescription until July 1, 1990, unless the prescription is superseded before July 1, 1990.[27]

16. Telus opposes BellSouth's petition.[28] Telus, an interexchange carrier offering service in several Florida cities, states that it is a major customer of BellSouth and is greatly affected by changes in BellSouth's rates.[29] Telus claims that deferral of the rate of return filing date and extension of the prescription period will enable BellSouth to avoid scrutiny of its recent earnings, which Telus feels are excessive. In opposing BellSouth's petition, Telus raises both procedural and substantive arguments.

17. Telus bases its first argument on procedural grounds. Telus asserts that BellSouth fails to meet its threshold burden of establishing unique or extraordinary circumstances which justify departure from the rule, and

that a waiver would be in the public interest. Contending that BellSouth alleges no unique circumstances, Telus likens BellSouth's filing to a petition for reconsideration of a final action in a Rule Making proceeding, which would now be foreclosed due to the expiration of the 30-day limitation period.[30]

18. Telus next challenges the merits of BellSouth's petition. Addressing BellSouth's four main arguments in order, Telus claims that BellSouth's petition does not provide a basis for waiver. First, Telus asserts that BellSouth has failed to establish that compliance with the Part 65 Rules as presently written is impossible. Disputing BellSouth's interpretation of Section 65.201(b), Telus maintains that this rule does not require the filing of financial data for the fourth quarter of 1988 by January 3, 1989. Further, Telus contends that a delay in filing data for one quarter does not justify a waiver of the entire rule.[31]

19. Telus also argues that there is no reason to delay the required rate of return filing pending revision of the Part 65 Rules. Claiming that BellSouth's petition is based upon the premise that the Commission should not act any time there is a relevant Rule Making proceeding underway, Telus asserts that such a policy would seriously undermine the entire regulatory process. Further, Telus states that the Commission had no intention of relieving any party of its filing obligations during the CC Docket No. 87-463 Rule Making proceeding. Telus also contends that the issues BellSouth raises today existed when the Commission extended the filing date for rate of return submissions until January 3, 1989. Telus notes that the Commission chose to address only the represcription schedule in that order, and left certain procedural issues such as the timing of data submissions for a later time. Telus maintains that since the Commission chose not to address the timing of data submissions in the *Deferral Order*, and since BellSouth allegedly raises no unique or extraordinary circumstances in this proceeding, there is no cause for the Commission to act to delay rate of return filings at this time.[32]

20. Telus further contends that coordination of rate of return submissions with the new access tariff filing schedule is irrelevant to the public interest. Telus emphasizes that the Commission order revising the annual interstate access tariff filing schedule said that "[w]hile it is desirable and convenient to coordinate the two events, it is by no means necessary."[33]

21. Finally, Telus asserts that ratepayer interests will not be adequately protected if the existing rate of return prescription is extended. Telus first claims that BellSouth's argument attempts to place the burden on the Commission to find that a represcription is required, rather than on BellSouth to show that extension of the current rate of return is justified and in the public interest. Next, Telus maintains that the cost of capital is only one of many factors to be considered in establishing the appropriate rate of return. Since BellSouth's petition to extend the current prescription focuses only on the cost of capital and ignores other factors, Telus states that it is impossible to find that the public interest will be served by extending the period during which BellSouth may escape an accounting. Telus also contends that BellSouth's recent earnings are excessive. To support this contention, Telus looks to trends in state utility commission activity. Citing a recent FCC report concerning rate case actions by state utility commissions,[34] Telus claims that the general national trend in state rate cases toward reducing revenue in the intrastate arena supports its argument that an examination of BellSouth's interstate rates and revenues is needed now. More specifically, Telus points to a recent decision by the Florida Public Service Commission which ordered a reduction in the rate of return and reductions in revenue of Southern Bell Telephone and Telegraph Company, a wholly-owned subsidiary of BellSouth, as evidence that BellSouth's recent earnings are excessive.[35]

VI. DISCUSSION

22. We find that petitioners have made a sufficient showing that deferral of the current rate of return submission deadline will serve the public interest. Petitioners have also demonstrated unique circumstances that justify a waiver. The pending Rule Making proceeding is likely to result in some changes in the data filing requirements for any future represcriptions. Deferral of rate of return submissions until midyear 1989 will afford the Commission more time to complete needed revisions to the Part 65 formula rules. Accordingly, we defer the current filing date of January 3, 1989, until June 30, 1989, for all LECs and AT&T. However, we do not determine whether the current prescription period should be extended.

23. It is apparent that an order in CC Docket No. 87-463 will not be forthcoming in time for the carriers to incorporate changes to the Part 65 Rules by January 3, 1989. Therefore, a short deferral of the filing date for rate of return submissions is appropriate in order to afford the Commission additional time to complete a thorough reexamination of the Part 65 Rules. Deferral of the filing deadline will allow represcription to proceed according to revised, improved rate of return rules, and will eliminate uncertainty on the part of filing carriers and the commenting public. Moreover, that procedure will avoid supplemental filings and multiple pleading cycles, thus conserving the limited resources of the carriers, the Commission, and the commenting public.[36] Finally, deferral will provide the opportunity for a represcription process that will protect the public from paying unjust charges for telecommunications services while allowing the carriers' shareholders to earn a fair return on their investment.

24. The situation today is quite similar to that in late 1987 when we partially granted the waiver requests of six carriers to temporarily defer the filing deadline for rate of return submissions. We stated in the *Waiver Order* that "[t]he Commission's reexamination of the Part 65 substantive methodologies, during the period in which the carriers would ordinarily be preparing their cases, presents a unique and extraordinary circumstance beyond the control of the carriers."[37] The same exigent circumstances which led to that decision are present today.

25. Thus, we must reject Telus' assertion that BellSouth has failed to meet its burden of alleging and proving circumstances sufficient to warrant relief. Both petitioners have made an ample showing that deferral of the filing deadline will serve the public interest by allowing represcription to proceed in a more reasoned and efficient manner.

26. In adopting BellSouth's suggestion for a six month deferral over Ameritech's petition for an indefinite postponement, we have carefully weighed the advantages and disadvantages associated with both proposals. We note that most commenters favor Ameritech's proposal to defer rate of return submissions until 90 days after a final order is

issued in CC Docket No. 87-463, since it reduces the possibility that another deferral may be necessary. In our view, however, the indefinite nature of the Ameritech postponement increases the uncertainty surrounding the represcription process. This uncertainty undercuts any advantage the Ameritech proposal may offer with respect to minimizing the risk that another deferral may be necessary.

VII. ORDERING CLAUSE

27. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. Section 154(i), that the petitions filed on October 6, 1988, by the Ameritech Operating Companies and BellSouth Corporation ARE GRANTED to the extent set forth herein.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] 47 C.F.R. § 65.102(c) (1987).

[2] Since petitioners raise basically the same issues and request similar relief, we shall address both petitions in this *Memorandum Opinion and Order* pursuant to delegated authority.

[3] 47 C.F.R. §§ 65.1 - 65.600 (1987).

[4] The rule specifies January 3 as the biennial date for filing rate of return submissions. If January 3 falls on a Saturday or Sunday, the rule provides that the required filing date shall be the next regular day of business.

[5] In a decision issued December 3, 1987, the Bureau extended the filing date eight weeks, from January 4, 1988, until February 29, 1988. Southwestern Bell Telephone Company *et al.*, Petitions for Waiver of Section 65.102, 2 FCC Rcd 7314, 7315, para. 13 (1987) (*Waiver Order*).

[6] Refinement of Procedures and Methodologies for Represcribing Interstate Rates of Return for AT&T Communications and Local Exchange Carriers, 2 FCC Rcd 6491 (1987) (*NPRM*).

[7] Refinement of Procedures and Methodologies for Represcribing Interstate Rates of Return for AT&T Communications and Local Exchange Carriers, 3 FCC Rcd 1697, 1698, para. 12 (1988) (*Deferral Order*).

[8] *Id.* at 1698, para. 16.

[9] Ameritech Petition at 4. *See Deferral Order*, 3 FCC Rcd at 1697.

[10] *See NPRM*, 2 FCC Rcd at 6491, para. 3.

[11] Ameritech Petition at 5.

[12] *Id.* at 4.

[13] *See Deferral Order*, 3 FCC Rcd at 1698, para. 13.

[14] BellSouth notes that we have previously recognized that certain data will not be available for a January filing deadline. *See* NPRM, 2 FCC Rcd at 6495, para. 35; *Waiver Order*, 2 FCC Rcd at 7315, paras. 12-13.

[15] *See* Access Tariff Filing Schedules, CC Docket No. 88-326, 3 FCC Rcd 5495 (1988) (*Access Tariff Order*). In order to provide a minimum of 90 days notice, with a scheduled effective date of July 1, 1990, the LECs will be required by Section 69.3 of the Rules to file annual access tariffs by March 31, 1990.

[16] The Ameritech and BellSouth petitions were placed on public notice. *See* Ameritech and BellSouth *Seek* Deferral of Rate of Return Filings and Extension of Rate of Return Prescription Period, *Public Notice*, DA 88-1604 (released October 17, 1988). The following parties filed comments: The American Telephone and Telegraph Company (AT&T); The Bell Atlantic Telephone Companies (Bell Atlantic); The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (U S West); New England Telephone and Telegraph Company and New York Telephone Company (NYNEX); Pacific Bell and Nevada Bell (the Pacific Companies); Southern New England Telephone Company (SNET); Southwestern Bell Telephone Company (Southwestern Bell); Telus Communications, Inc. (Telus); and The United States Telephone Association (USTA). Ameritech, BellSouth, Bell Atlantic, and the Pacific Companies filed reply comments.

[17] U S West Comments at 6.

[18] Bell Atlantic Comments at 1-2.

[19] SNET Comments at 2-3.

[20] Southwestern Bell Comments at 4, 6.

[21] USTA Comments at 2-3.

[22] NYNEX Comments at 2.

[23] The Pacific Companies Comments at 3-5.

[24] AT&T is subject to the same rate of return submission date as the LECs under Section 65.102(c). However, the Commission has prescribed separate authorized rates of return for AT&T and the LECs. AT&T is subject to a 12.2% rate of return, while the LECs are subject to a 12% rate of return. *See* Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket 84-800, Phase III, FCC 86-354, released August 25, 1986, *recon. denied*, 2 FCC Rcd 5636 (1987). The separate prescription periods for AT&T and the LECs are both due to expire at the end of 1989. *See Deferral Order*, 3 FCC Rcd at 1698, para. 12.

[25] AT&T Comments and Petition at 3.

[26] AT&T cites the pending price cap rule making proceeding in CC Docket No. 87-313 (*see* Policy and Rules Concerning Rates for Dominant Carriers, *Notice of Proposed Rule Making*, 2 FCC Rcd 5208 (1987)), which could eliminate rate of return regulation for AT&T. AT&T Comments and Petition at 1-2.

[27] BellSouth Reply Comments at 2-3.

[28] Telus directs its comments only to the BellSouth petition; it does not address the Ameritech petition.

[29] Telus Comments at 1, n. 2.

[30] *Id.* at 2-3. *See* 47 C.F.R. § 1.429(d) (1987).

[31] Telus Comments at 4-6.

[32] *Id.* at 6-8.

[33] *Id.* at 9-10. *See Access Tariff Order*, 3 FCC Rcd at 5497, para. 23.

[34] *Summary of State Telephone Rate Cases*, News Release No. 267 (released October 28, 1988).

[35] Telus Comments at 10-16.

[36] *See* North American Telecommunications Association, Petition for Declaratory Ruling Under Section 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced

Services and Customer Premises Equipment, 3 FCC Rcd 5278 (1988) (extending date for filing cost manual amendments in order to avoid multiple filings and pleading cycles).

[37] *Waiver Order*, 2 FCC Rcd at 7315, para. 10.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request of

NATIONAL	8330-SM
BROADCASTING	C10-144
COMPANY, INC.	

For Declaratory Ruling

STAFF RULING

Adopted: November 9, 1988; Released: November 9, 1988

By the Chief, Fairness/Political Programming Branch:

1. The Commission has before it a request for a declaratory ruling filed October 7, 1988, by National Broadcasting Company, Inc. (NBC), on behalf of WRC-TV, Washington, D.C. NBC seeks a Commission determination that WRC-TV's "America's Black Forum" program is a "bona fide news interview" program, and that, as such, appearances by legally qualified candidates are exempt from the "equal opportunities" provision of Section 315(a) of the Communications Act of 1934, as amended [47 U.S.C. 315(a)(2)]. We grant the request and find that "America's Black Forum" is a bona fide news interview program.

2. NBC owns and operates television station WRC-TV, Washington, D.C., through a wholly-owned subsidiary. According to NBC, "America's Black Forum" is an interview program which focuses on national news and policy makers. Julian Bond is the interviewer and where appropriate, will provide additional commentary on the program's subject matter. It is regularly scheduled on a weekly basis on WRC-TV and other NBC owned stations.

3. "America's Black Forum" is co-produced by WRC-TV and Uniworld Group, Inc. (Uniworld). According to NBC, "[w]hile Uniworld is initially responsible for selection of interview subjects, WRC-TV's Program Director and/or other WRC-TV Program Department staff are present during production and are free to participate in any and all elements of production and post production." Furthermore, NBC asserts that it has final editorial approval before the program airs.

4. NBC contends that "America's Black Forum" satisfies the criteria the Commission requires for a "bona fide news interview" exemption under Section 315(a)(2) of the Communications Act because it is "regularly scheduled" to air on a weekly basis, year-round, and it is co-produced by a licensee. NBC also emphasizes that all decisions to be made by WRC-TV and Uniworld will be based solely on objective, reasonable, journalistic judgments and not on any intention to advance the candidacy of a particular individual.

DISCUSSION

5. Section 315 of the Communications Act provides that if a licensee permits a legally qualified candidate to "use" its broadcast station (an appearance by voice or picture), it must afford equal opportunities to other candidates for that office. In 1959 Congress amended Section 315 to exempt appearances by legally qualified candidates on the following news programs:

> (1) bona fide newscast,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto).

47 U.S.C. Section 315(a). In determining whether a program qualifies as a "bona fide news interview," the Commission considers the following factors: (1) whether it is regularly scheduled; (2) whether the broadcaster controls the program; and (3) whether the broadcaster's decisions on the format, content and participants are based on its reasonable, good faith journalistic judgment and newsworthiness rather than on an intention to advance any individual's candidacy. *See U. S. News and World Report, L. P.*, 2 FCC Rcd 7101 (1987).

6. Based on NBC's request, it appears that "America's Black Forum" is exempt from equal opportunities as a bona fide news interview program under Section 315(a)(2). The program is regularly scheduled to air on a weekly basis. *See Aspen Institute*, 55 FCC 2d 697, 709 (1975). NBC represents that WRC-TV's representatives participate in the production process. While "America's Black Forum" is co-produced with a non-licensee entity, WRC-TV's final editorial approval rights over each program ensures the type of control required by Congress. *See U. S. News and World Report, L.P., supra; Media and Society Seminars*, 56 RR 2d 1150 (M. Med. Bur. 1984). Moreover, according to NBC, all decisions by both WRC-TV and Uniworld regarding the format, editing, content and participants are based on their good faith journalistic judgment and newsworthiness, and are not intended to advance any individual's candidacy.

7. In view of the foregoing, it appears that "America's Black Forum" should be classified as a bona fide news interview program. Accordingly, appearances by legally qualified candidates for public office will be exempt from the equal opportunities requirement of Section 315.

8. Staff action is taken here pursuant to delegated authority.

FEDERAL COMMUNICATIONS COMMISSION

Milton O. Gross, Chief
Fairness/Political Programming Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, Pacific Northwest Bell Telephone Company Tariff F.C.C. No. 1	Transmittal Nos. 174 and 210

ORDER

Adopted: December 6, 1988; Released: December 7, 1988

By the Deputy Chief, Common Carrier Bureau:

1. On July 1, 1988, the Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (US West) filed Transmittal No. 174 to establish a ballot and allocation plan for US West-owned public and semi-public pay telephones. On July 18, 1988, MCI Telecommunications Corporation (MCI) filed a petition to suspend and investigate, while petitions to reject or suspend and investigate were filed by US Sprint Communications Company (Sprint), Intellicall, Inc. (Intellicall), the Public Telephone Council (PTC), and the American Payphone Communications Council (APCC).[1] On July 28, 1988, US West filed its opposition to the petitions against Transmittal 174.[2] The tariff is scheduled to take effect on December 1, 1988.

2. Transmittal 174 establishes presubscription procedures for credit card calls, calling card calls, and billed-to-third number calls from public and semi-public pay telephones owned by US West. MCI complains that under the US West plan, the presubscription choice will be made by an entity that neither places, nor pays for, inter-LATA calls; MCI advocates a uniform 10XXX dialing plan. MCI Petition at 5-6. Sprint and Intellicall predict that American Telephone and Telegraph Company (AT&T) will be able to pay premises owners higher commissions than other ICs. Sprint Petition at 5; Intellicall Petition at 4 n.3. MCI and Sprint argue that the US West proposal would perpetuate AT&T's monopoly over pay telephone traffic, since only AT&T knows which payphones produce the greatest revenue and can therefore target its marketing accordingly. MCI Petition at 7; Sprint Petition at 4. Sprint notes that AT&T is the only IC currently able to validate all Bell Operating Company (BOC) calling cards and process third-party-billed, collect, and sent-paid calls. *Id.* at 3.

3. US West replies that its presubscription plan gives callers an otherwise unavailable option in that it allows them to place long distance calls without dialing access codes. US West Opposition at 15. It contends that the 10XXX approach MCI advocates, blocking all 1+ and 0+ calls, is similar to a proposal already rejected by the Commission. *Id.* at 21. In addition, although US West acknowledges the difficulties faced by ICs other than AT&T in attracting presubscription orders, it argues that it has fulfilled its commitment to provide validation data through a subsidiary, US West Service Link. *Id.* at 6.

4. Pursuant to Special Permission No. 88-547, US West filed Transmittal No. 210 on November 21, 1988. Transmittal 210 makes clear who has authority to make the presubscription selection and resolves various other ambiguities in the tariff language. On November 28, 1988, MCI filed a petition to suspend and investigate Transmittal 210. MCI observes that US West failed to bring to the Commission's attention a letter sent to all BOCs by the United States Department of Justice regarding what should be included in the payphone presubscription plans filed pursuant to the *October 14 Order*. MCI Petition To Suspend and Investigate Transmittal No. 210 at 2. MCI also expresses concern that it has not yet received the information it needs to market its services properly to premises owners of the payphones affected by the US West plan. *Id.* at 2-3. MCI further notes that the Commission's *Allocation Order* for business and residential customers [3] provides that carriers must issue ballots 90 days prior to the conversion of the affected end office. *Id.* at 3-4, 4 n.4.

5. In an opposition to the MCI petition filed on November 29, US West asserts that it has complied with the *October 14 Order*. US West Opposition to MCI Petition To Suspend and Investigate Transmittal No. 210 at 1-2. US West notes that it has advised MCI of the details of its payphone presubscription plan, including the implementation schedule and the names and addresses of the affected premises owners. *Id.* at 2-4. US West further asserts that the 90-day requirement imposed in the *Allocation Order* applies only to business and residential telephones. *Id.* at 4-5. US West claims that this waiting period would be impractical since the end offices in question have already been converted to equal access and since the payphone ballots cannot all be implemented on the same day. *Id.* at 5 & n.6.

6. The Common Carrier Bureau has reviewed the tariff transmittals, the description and justifications supporting them, and the pleadings. We find that no compelling argument has been presented that the tariff revisions filed by US West are patently unlawful so as to require rejection or that the revisions warrant investigation at this time.

7. Accordingly, IT IS ORDERED that the petitions opposing Mountain States Telephone Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company Tariff F.C.C. No. 1, Transmittal No. 174, filed by MCI Telecommunications Corporation, US Sprint Communications Company, Intellicall, Inc., the Public Telephone Council, and the American Payphone Communications Council ARE DENIED.

8. IT IS FURTHER ORDERED that the petition to suspend and investigate Mountain States Telephone Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company Tariff F.C.C. No. 1, Transmittal No. 210, filed by MCI Telecommunications Corporation, IS DENIED.

9. IT IS FURTHER ORDERED that the motion for leave to file a supplement filed by the American Public Communications Council and the motion for leave to supplement the record filed by Mountain States Tele-

phone Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company ARE DENIED.

10. IT IS FURTHER ORDERED that the motion to strike filed by Mountain States Telephone Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] On July 28, 1988, Pacific Bell filed an opposition to Sprint's pleading and on August 8, the Public Pay Telephone Association filed comments in support of the Intellicall, PTC, and APCC petitions. On August 11, US West filed a motion to strike the Public Pay Telephone Association comments. As neither pleading is authorized by the Commission's Rules, they are hereby dismissed.

[2] On August 9, 1988, APCC moved for leave to supplement the record to include *United States v. Western Elect. Co.*, CA No. 82-0192, Order (D.D.C. Aug. 5, 1988), which enjoined US West from implementing its presubscription plan. On August 11, US West moved for leave to supplement the record with its motion to vacate the Court's preliminary injunction, as well as its memorandum in response to the Court's order. As neither of these supplements is necessary to our decision, we deny both the APCC and US West motions.

On October 14, 1988, the United States District Court for the District of Columbia issued a final decision in the above-captioned proceeding. The Court ordered, among other things, that the BOCs issue ballots implementing payphone presubscription not later than January 1, 1989. *See United States v. Western Elect. Co.*, CA No. 82-0192, Opinion (D.D.C. Oct. 14, 1988); *United States v. Western Elect. Co.*, CA No. 82-0192, Order (D.D.C. Oct. 14, 1988) (October 14 Order). *See also United States v. Western Elect. Co.*, CA No. 82-0192, Order (D.D.C. Nov. 9, 1988) (denying US Sprint's petition for limited reconsideration of the October 14 Order).

[3] Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, 101 FCC 2d 911, *recon. denied*, 102 FCC 2d 503 (1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

WESTERN UNION CORPORATION — File No. I-T-C-88-198

For authority to provide transborder satellite video service via Westar V from Aruba, Netherlands Antilles to the U.S. Virgin Islands and other locations.

BENEDEK BROADCASTING OF THE VIRGIN ISLANDS — File No. CSG-88-087-P/L

For authority to establish a receive-only earth station for reception of transborder satellite video service on St. Thomas, U.S. Virgin Islands

ORDER AND AUTHORIZATION

Adopted: December 1, 1988; Released: December 5, 1988

By the Chief, International Facilities Division:

1. The Commission has under consideration the above-captioned applications filed by Western Union Corporation (Western Union) and Benedek Broadcasting of the Virgin Islands, Inc. (Benedek) requesting authority pursuant to Section 214 and Title III of the Communications Act of 1934, as amended, to allow for the reception in the U.S. Virgin Islands of video programming originated in Aruba, Netherlands Antilles[1] and transmitted via the Westar V satellite. The applications were placed on public notice and no comments were received.

2. At its June, 1988 Board of Governor's meeting (BG-76) INTELSAT approved, pursuant to Article XIV(c) of the INTELSAT Agreement, the use of the Westar V satellite for the provision of domestic television services to the Netherlands Antilles originating in Aruba.[2] Benedek is the licensee of WBNB-TV, Channel 10, in St. Thomas, U.S. Virgin Islands. Benedek herein requests authority to establish a receive-only earth station in St. Thomas in order to receive the television signals carried over the Westar V satellite which originate in Aruba. Benedek states that it will adhere to all copyright laws. Since the Westar V satellite is only consulted in this instance to provide strictly domestic service throughout the Netherlands Antilles, Western Union requests authority to permit the Westar V transmissions to be received in St. Thomas by Benedek. Western Union states that reception of its signal by Benedek is within the scope of the Commission's decision in *Transborder Satellite Video Services.*[3] According to Western Union, the programming already exists on the satellite and is continuously capable of being received at transborder locations. Thus, Western Union states that the extension of service to small, low-cost receive only earth stations involves little or no cost to the carrier or programmer, whereas use of the INTELSAT system would be a far more costly proposition.

3. After consideration of the applications, we conclude that their conditional approval is consistant with the Commission's Transborder policy as implemented by several transborder decisions. In 1981, following consultations with the Department of State, the Commission gave initial approval for use of U.S. domestic satellites for the transmission of certain international public telecommunications services to points within the footprint of those satellites. The Commission determined that domestic satellites could be used for these services where INTELSAT is incapable of providing the service or where it would be clearly uneconomical or impractical to use the INTELSAT system for the service. We find that the circumstances involved here clearly satisfy the second part of the transborder test. In past decisions, the Commission has stated that where an existing domestic network is in place, and the reception of signals is on an incidental and peripheral basis, use of the INTELSAT system would be clearly uneconomical and impractical. The instant situation is no different from the Commission's authorization of reception in the U.S. of existing programming carried over Canadian and Mexican domestic satellite systems. Thus, the applications are totally consistent with the Commission's Transborder policy and decisions. However, since INTELSAT Article XIV(d) consultation has not been completed for the reception of the programming by locations outside of the Netherlands Antilles, this authorization is conditioned on the following steps: (1) completion of the INTELSAT Article XIV(d) process;[4] and (2) the issuance of an order by the Chief Common Carrier Bureau, authorizing final implementation of service.

4. Accordingly, IT IS ORDERED that the applications of Western Union (File No.I-T-C-88-198) and Benedek Broadcasting of the Virgin Islands, Inc. (File No. CSG-88-087-P/L) ARE GRANTED provided that no service may be implemented until: (1) the Department of State informs the Commission that the United States has satisfied its Article XIV(d) obligations and that the Commission may proceed with final authorization of the proposed system; and (2) the Chief, Common Carrier Bureau issues an order authorizing final implementation of service.

5. This authorization constitutes the final step for the provision of transborder services through domestic satellites only insofar as the U.S. regulatory process is concerned. It does not, however, dispense with any requirements that may be imposed by the other country involved.

6. This order shall not be construed as authorizing the distribution of programming where the appropriate copyright clearances have not been obtained.

7. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] Western Union filed supplemental information on October 14, 1988.

[2] Article XIV(c) of the INTELSAT Agreement provides that:

> To the extent that any Party or Signatory or person within the jurisdiction of a Party intends to establish, acquire or utilize space segment facilities separate from the INTELSAT space segment facilities to meet its domestic public telecommunications services requirements, such Party or Signatory, prior to the establishment, acquisition or utilization of such facilities, shall consult the Board of Governors, which shall express, in the form of recommendations, its findings regarding the technical compatibility of such facilities and their operation with the use of the radio frequency spectrum and orbital space by the existing or planned INTELSAT space segment.

[3] 88 FCC 2d 258 (1981).

[4] Article XIV(d) of the INTELSAT Agreement requires that any use of non-INTELSAT facilities by a Party or Signatory to meet its international public telecommunications services requirements shall be consulted with INTELSAT to ensure technical compatibility and to avoid significant economic harm.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-125
Phase I

In the Matter of

Annual 1985 Access Tariff Filings

ORDER

Adopted: December 1, 1988; Released: December 2, 1988

By the Chief, Common Carrier Bureau:

I. BACKGROUND

1. On October 28, 1988, the Ameritech Operating Companies (Ameritech) filed a motion for stay of requirements set forth by the Common Carrier Bureau (Bureau) in an Order released October 5, 1988.[1] On November 7, 1988, Ameritech filed a petition for reconsideration of that Order's requirements. The *October 5 Order* disallowed a portion of Ohio Bell Telephone Company's (Ohio Bell) revenue requirement for the period from October 1, 1985, to December 31, 1986, that reflects 9.1 million in expenses and 28.7 million in net investment.[2] The *October 5 Order*, furthermore, required Ohio Bell to submit a specific procedure by which it proposes to implement either refunds or rate adjustments based upon the amount disallowed. [3] American Telephone and Telegraph Company (AT&T) filed an opposition to Ameritech's motion for stay on November 4, 1988.

II. DISCUSSION

2. In considering Ameritech's motion to stay, it is appropriate to apply the test promulgated by the United States Court of Appeals in *Virginia Petroleum Jobbers Ass'n v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958) (*Virginia Jobbers*). The court in that decision listed four factors which must be considered in deciding whether to grant a motion for stay. First, petitioner must show that it is likely to prevail on the merits. In addition, petitioner must demonstrate that without the relief sought, it will suffer irreparable harm. The petitioner must also be prepared to show that issuance of the stay will not harm other interested parties in the proceeding. Finally, the public interest must be taken into consideration. The *Virginia Jobbers* court emphasized that in administrative proceedings, the paramount interest is that of the public and therefore, the "interests of private litigants must give way to the realization of public purposes."[4]

3. Ameritech argues that it is likely to succeed on the merits, stating that evidence exists to demonstrate that Ohio Bell followed correct jurisdictional separations procedures and did not recover the same investment and expenses in its state and interstate rates.[5] This evidence, Ameritech continues, is made available to the Bureau in Ameritech's petition for reconsideration. AT&T counters that under the *Virginia Jobbers* test, Ameritech's likelihood of prevailing on the merits must be based on the current record.[6]

4. Ameritech next argues that if we do not grant its motion, it will be irreparably harmed by being required to refund the amount disallowed.[7] On the other hand, it observes, issuance of the stay will not harm other interested parties. Ratepayers, Ameritech asserts, will be made whole if, after Ameritech has exhausted all of its remedies, it is found liable for the disallowed amount.[8] In contrast, Ameritech continues, if it is made to refund or credit the disallowed amount and then succeeds on appeal, it will be irreparably harmed by the cost of recovering the amount refunded or credited. Finally, Ameritech urges the Bureau to weigh the argument of irreparable harm with its assertion that ratepayers will not be harmed if any possible refund is delayed by the review process.[9]

5. AT&T responds that Ameritech will not be irreparably harmed because the Bureau has not yet required a refund. According to AT&T, the *October 5 Order* simply requires Ameritech to submit a proposed procedure for how it will refund or credit the disallowed amount.[10]

6. We conclude that Ameritech's motion for stay should be granted. While the Commission's Rules do not allow the introduction of new material upon reconsideration,[11] Section 1.106(c) of the Rules, 47 C.F.R. § 1.106(c), does give the Commission discretion to accept such material if it believes it would be in the public interest to do so. We believe that it would be in the public interest to accept Ameritech's evidence in deciding whether it is likely to prevail on the merits. Without passing judgment on that new evidence, our initial review of it indicates that there is sufficient reason to believe that Ameritech is likely to succeed upon reconsideration.

7. Furthermore, we agree with Ameritech that ratepayers will not be harmed if the refunded or credited amount is delayed while the process of review is exhausted. This is especially so when balanced against the costs that will be incurred by Ameritech in preparing a procedure for refunding or crediting the disallowed amount, and the difficulty Ameritech would face in attempting to recover any refund ordered if Ameritech were to succeed on appeal. Hence, in considering all of the equities and public interest considerations, we believe that the stay should be granted.

III. ORDERING CLAUSE

8. IT IS ORDERED that the motion for stay filed by the Ameritech Operating Companies in the above-captioned proceeding IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* Annual 1985 Access Tariff Filings, CC Docket No. 88-125, Phase I, DA88-1568, released Oct. 5, 1988 *October 5 Order).*

[2] *Id.* at para. 8.

[3] *Id.* at para. 9. The *October 5 Order* required Ameritech to submit this procedure by November 5, 1988. The Bureau subsequently extended this deadline to December 5, 1988. *See* Annual 1985 Access Tariff Filings, CC Docket No. 86-125, Phase I, DA 88-1754, released Nov. 4, 1988

[4] Virginia Jobbers, 259 F.2d at 925.

[5] Ameritech Motion at 2.

[6] AT&T Opposition at 2-3.

[7] Ameritech Motion at 5.

[8] *Id.*

[9] *Id.*

[10] AT&T Opposition at 3.

[11] *See* 47 C.F.R. § 1.106.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company Revisions to Tariff F.C.C. No. 1

Transmittal No. 187

Petition for Waiver of Section 69.4(b) and Subparts B and C of Part 69 of the Commission's Rules

ORDER

Adopted: November 29, 1988; Released: November 29, 1988

By the Chief, Common Carrier Bureau:

1. On August 30, 1988, the above-referenced revisions were filed by the Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company, jointly, as the US West Companies (US West). US West proposes to offer 900 Access Service to all interexchange carriers (ICs)[1] and to use a rate structure for cost recovery that differs from its current structure for 800 Access Service. Along with Transmittal 187, US West also filed a petition for waiver of Section 69.4(b) of the Commission's Rules, 47 C.F.R. § 69.4(b), seeking permission to establish a separate rate element to recover its 900 Access Service costs. MCI Telecommunications Corporation (MCI) filed on September 14, 1988, a petition to reject or, in the alternative, suspend and investigate. US West replied to MCI's petition on September 26, 1988.

2. As explained by US West, 900 Access Service is an originating trunk-side switched access service that connects the end user placing a 900 Service call to the appropriate IC providing that service.[2] That connection, US West continues, is accomplished through a unique dialing pattern that identifies the IC to which the end user has presubscribed. The pattern is based on the "NXX plan" which US West currently utilizes in connection with its 800 Access Service. [3] US West asserts that a waiver of Section 69.4(b), and Subparts B and C, will facilitate the offering of 900 Access Service to all ICs.

3. In order to provide 900 Access Service to all ICs, US West states that it must modify its companies' networks. As a result of this modification, US West filed both the tariff revisions and the waiver petition, with separate charges established for its 900 Access Service. US West claims that having separate charges will insure that those costs unique to the service will be sustained only by users of the service.[4] US West proposes to recover the costs for 900 Access Service by implementing two non-recurring charges (NRCs) and one recurring charge.[5]

4. MCI argues that the rates and rate structure for 900 Access Service should be identical to US West's 800 Access Service because the two services are the same.[6] MCI contends that inasmuch as US West recovers the costs for its 800 Access Service solely through a recurring charge, it should do the same for its 900 Access Service.

5. US West admits in its reply that its proposed rate structure for 900 Access Service differs from its rate structure for its 800 Access Service. It maintains, however, that it is proposing a different rate structure for 900 Access Service because the anticipated demand for 900 Access Service is lower than the demand for its 800 Access Service.[7] Demand for 800 Access Service was high enough, US West explains, to make feasible the recovery of costs solely through a recurring charge, *i. e.*, the Customer Identification Charge (CIC).[8] US West asserts that demand for 900 Access Service is expected to be too low for it to charge only a recurring charge.[9]

6. The Common Carrier Bureau has reviewed the tariff transmittal, US West's revisions, and the various pleadings. We conclude that no compelling argument has been presented that the tariff proposal is patently unlawful so as to require rejection and that no question has been presented that warrants suspension or investigation at this time.

7. IT IS THEREFORE ORDERED that the petition to reject or, in the alternative, to suspend and investigate, Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company Tariff F.C.C. No. 1, Transmittal No. 187, filed by the MCI Telecommunications Corporation IS DENIED.

8. IT IS FURTHER ORDERED that the petition for waiver of Section 69.4(b) and Subparts B and C of Part 69 of the Commission's Rules, filed jointly by Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] The service is currently being offered only to American Telephone and Telegraph Company (AT&T). *See* US West Description and Justification (D&J) at 1-1.

[2] US West Petition at 2.

[3] *Id.*

[4] *Id.*

[5] *Id.* at 3.

[6] MCI Petition at 2.

[7] *See* US West Reply at 7-8; *see also id.* at 4-5 n.14.

[8] *Id.* at 4 n.14.

[9] *Id.* at 7-8.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AUDIO ENTERPRISES, INC.,

File No. ENF-88-04

Apparent Liability for Forfeiture

NOTICE OF APPARENT LIABILITY

Adopted: April 21, 1988; Released: July 6, 1988.

By the Commission: Commissioner Dennis issuing a separate statement.

1. The Commission has before it two complaints alleging that Audio Enterprises, Inc., of Mill Valley, California, transmitted obscene messages in violation of Section 223(b) of the Communications Act (Act), 47 U.S.C. § 223(b).[1] The first complaint, filed September 14, 1987, alleges that on July 26, 1987, the complainant's thirteen-year-old son placed a telephone call lasting 211 minutes to a telephone number leased to Audio Enterprises, (900) 410-6749, and that the subject matter communicated to her son was obscene. The second complaint, filed July 21, 1987, alleges that from June 26 to July 11, 1987, complainant's sixteen-year-old son made eight calls to the same Audio Enterprises number.

2. On December 7, 1987, the Common Carrier Bureau sent a letter to Audio Enterprises requesting it to respond to the issues raised by the complaints to assist the Commission in determining whether and the extent to which violations of Section 223(b) have occurred.[2] As discussed below, we conclude, based on the evidence before us, that the actions of Audio Enterprises appear to be in violation of Section 223(b)(1)(A) and that it has not availed itself of the defenses set forth in Section 64.201 of the Commission's rules, 47 C.F.R. § 64.201. [3]

3. From October 6, 1987, until January 10, 1988, when Audio Enterprises transferred its 900 number to another adult message service provider, the Commission's investigation documented twenty-six additional calls to the Audio Enterprises number. Each time we placed a call to Audio Enterprises' number, we observed that Audio Enterprises failed to use a Commission-approved method of restricting access. The Commission's calls were all placed from Washington, D.C., and were made on different days and during different times of the day. Every call placed by our investigators went through with easy, unimpeded access. At no time did the message service provider ever require an access code or credit card number before the messages could be accessed, or use any other effective method to restrict access. As a result, it does not appear that Audio Enterprises can avail itself of any of the defenses set forth in our rules. We furthermore find that apparently the messages were provided by Audio Enterprises in connection with a business enterprise (and hence "for commercial purposes" within the meaning of Section 223(b)) and that the messages we recorded are obscene within the legal definition of that term.

4. Under these circumstances, imposition of forfeiture penalties appears warranted. Section 223(b)(4) authorizes the Commission to impose a civil fine of up to 50,000 per violation, with each day of noncompliance constituting a separate violation. For the reasons explained below, we find that on each day we tape-recorded messages, which began on October 6, 1987, and continued through January 10, 1988 (the date defendant relinquished its line), Audio Enterprises apparently violated Section 223(b), and we propose to levy a fine on the corporation of 600,000 for the violations.

I. BACKGROUND

A. *The Statute and Implementing Rule*

5. In 1983, Congress amended Section 223 of the Communications Act, making the interstate transmission of obscene or indecent telephone calls to persons under the age of 18 or to nonconsenting adults a federal offense. Congress was responding to a concern that the nation's young people were being exposed to the offensive and damaging messages of the burgeoning "dial-a-porn" industry. Congress felt that the apparent inability of parents to effectively supervise their children's access to obscene dial-a-porn messages placed a duty on the government to intervene.[4] Congress indicated that the interest in protecting innocent children in such a situation was a compelling interest which justified regulation even in the sensitive area of constitutionally protected free speech rights.[5] Section 223(b), as amended, provides in pertinent part:

> (1) Whoever knowingly --
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> (A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any obscene or indecent communication for commercial purposes to any person under eighteen years of age or to any other person without that person's consent, regardless of whether the maker of such communication placed the call; or
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> (B) permits any telephone facility under such person's control to be used for any activity prohibited by subparagraph (A), shall be fined not more than50,000 or imprisoned not more than six months, or both.
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> (2) It is a defense to a prosecution under this subsection that the defendant restricted access to the prohibited communication to persons eighteen years of age or older in accordance with procedures which the Commission shall prescribe by regulation.

* * * * *

(4)(A) In addition to the penalties under paragraphs (1) and (3), whoever, in the District of Columbia or in interstate or foreign communication, violates paragraph (1)(A) or (1)(B) shall be subject to a civil fine of not more than50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(B) A fine under this paragraph may be assessed either --

(i) by a court, pursuant to a civil action by the Commission or any attorney employed by the Commission who is designated by the Commission for such purposes, or

(ii) by the Commission after appropriate administrative proceedings.

47 U.S.C. § 223(b).[6]

6. In 1984, pursuant to the mandate of subsection (b)(2) of the the statute, the Commission first adopted Section 64.201 of the Commission's rules. After fully considering a number of different alternatives, the Commission established two methods of restricting access by children and nonconsenting adults.[7] Under the *First Report and Order*, a dial-a-porn provider would have a defense to an enforcement action brought under the statute: (1) by restricting the time obscene or indecent messages could be transmitted to 9:00 p.m. to 8:00 a.m. eastern time; or (2) by requiring payment by credit card prior to transmitting any messages. On November 2, 1984, the United States Court of Appeals for the Second Circuit accepted the credit card restriction, but invalidated the Commission's regulation insofar as it imposed time of day restrictions and remanded the case to the Commission for further proceedings.[8] The court agreed that protecting children from exposure to sexually explicit material is a compelling state interest. But it found the time channelling restriction to be both overinclusive, in that it restricted access to adult messages by adults during the day, and underinclusive, in that it failed to restrict access by children during the late evening hours.[9] Because it found the rule unconstitutional, the court declined to address the question of the constitutionality of the underlying statute.

7. In response to the court's remand, the Commission adopted a *Second Notice of Proposed Rule Making* proposing a number of additional methods of restricting access by children and nonconsenting adults.[10] After reviewing numerous comments from message service providers, telephone companies and other interested parties, the Commission adopted a new Section 64.201 in the *Second Report and Order*.[11] In that order, the Commission adopted a rule requiring dial-a-porn providers to restrict children's access by requiring either a credit card number or an access code before the message could be heard. The access code would be available only to adults who requested it by written application. The Commission thoroughly examined all the options it proposed, as well as others proffered by interested parties, and concluded that the credit card and access code options were the only options then currently available which were effective, feasible and could meet the strict scrutiny standard enunciated by the court. The Second Circuit again stayed the effectiveness of Section 64.201 pending a decision on the merits.

8. On April 11, 1986, the Second Circuit Court of Appeals held that the access code and credit card options were both effective and constitutional methods of restricting access by children and nonconsenting adults to obscene or indecent communications.[12] Nevertheless, it continued its stay for message services, such as Carlin Communications, in New York Telephone (NYT) territory because it found that NYT's mass announcement service (MAS) lacked the interactive capability necessary to accommodate either the credit card or access code requirements. It remanded the case to the Commission to consider whether less burdensome methods of restricting access were feasible in NYT territory. For the rest of the country, however, Section 64.201 became effective as of April 11, 1986.

9. After soliciting a third round of comments from interested parties, the Commission adopted the *Third Report and Order* on April 16, 1987.[13] The *Third Report and Order* did not disturb the findings of the *Second Report and Order* as to the effectiveness of the access code and credit card options for all areas of the country except for messages provided from NYT telephone numbers. The *Third Report and Order* also extended those two methods of restricting access to message services using telephone numbers in NYT territory based on NYT's representation that it planned changes to its MAS facilities which would incorporate the interactive capability necessary for these two options to be feasible methods of restricting access. The *Third Report and Order* also adopted a third method for restricting access that would be available nationwide: scrambling the adult message so that only an adult with a descrambler could access the message. Finally, regardless of which option the message provider selected, the Commission also required message providers subscribing to an MAS tariffed at this Commission to request the carrier to identify in the customer's telephone bill that a particular call was to an adult message service. On July 10, 1987, the Second Circuit stayed the effectiveness of the *Third Report and Order* pending a decision on the merits, thereby staying implementation of access codes in NYT territory and scrambling nationwide.

10. On January 15, 1988, the Second Circuit issued its decision upholding the validity of the rule adopted in the *Third Report and Order*.[14] It found that all three options were effective and feasible in restricting access and were the least restrictive means of limiting access to adult message services by children and nonconsenting adults available at that time. The court announced, however, that it would not issue its mandate in the case for 90 days in order to give message providers in New York time to comply with the rule.

11. Having concluded that the Commission's rule was valid, the court considered for the first time the constitutionality of the underlying statute. It concluded that Section 223(b) is constitutional insofar as it regulates obscene speech. With respect to the term "indecent," the court stated that it did not believe Congress intended it to have a separate meaning from "obscene." However, regardless of Congress' intent, the court concluded that, for the purposes of telephone communications, indecency was not a separate category of speech which the government could constitutionally regulate. Thus, to uphold the constitutionality of the statute, the court read the term "inde-

cent" out of the statute.[15] Therefore, Section 223(b), as interpreted by the Second Circuit, currently only proscribes the transmission of obscene messages to children and nonconsenting adults.

12. Since the rule adopted in the *Third Report and Order* was not yet in effect at the time of the transmissions at issue before us, we are proceeding in this case based on the rule adopted in the *Second Report and Order* which has been in effect since April 1986 in all parts of the country outside of NYT territory.[16] The rule adopted in that order, which was in effect at the time of this apparent violation, provided:

> It is a defense to prosecution under Section 223(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 223(b) (1983), that the defendant has taken either of the following steps to restrict access to the communications prohibited thereunder:
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> (a) Requires an authorized access or identification code before transmission of the subject message begins, where the defendant
>
> (1) Has issued the code by mailing it to the applicant after reasonably ascertaining through receipt of a written application that the applicant is not under eighteen years of age; and
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> (2) Has established a procedure to cancel immediately the code of any person upon written, telephonic or other notice to the defendant's business office that such code has been lost, stolen, or used by a person or persons under the age of eighteen, or that such code is no longer desired; or
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> (b) Requires payment by credit card before transmission of the message.

47 C.F.R. § 64.201 (1986).

B. ***The Complaints***

13. The first complaint was filed in September 1987. The complainant resides in Michigan and alleges that on July 26, 1987, her minor son placed a call to (900) 410-6749, a number which was leased by American Telephone and Telegraph Company (AT&T) to Audio Enterprises. The complainant alleges that her thirteen-year-old son and his fifteen-year-old friend, her fourteen-year-old son and two friends, and her ten-year-old daughter listened to the message. All six children were listening on different extensions so that when the complainant ordered her thirteen-year-old son to hang up, the other children continued to listen to the message. Unbeknownst to the complainant, the call lasted a total of 211 minutes.

14. The complainant states that within forty-eight hours of the call, two events occurred as a result of the children listening to the message. First, the fifteen-year-old friend and his brother molested complainant's daughter who, according to police reports, "had encouraged them by asking them to touch her and 'Do it with her.'" She apparently used phrases she had heard during the call. Second, the complainant's thirteen-year-old son had sexual intercourse with an underaged girl and explained that the phone call had made it sound like fun.

15. The complaint states that the call resulted in damage to the family's lives and to their relationship with their community. In addition, the complainant's husband is hospitalized because of the anxiety allegedly caused by the incidents. The complaint included several phrases of what the children remembered six weeks after the call, including descriptions of sexual acts in unusual locations, several different types of sexual acts, and specific references to male and female genitalia in vulgar slang terminology.

16. The second complainant lives in Texas and expressed her concern, after seeing her telephone bill, that her minor son had called Audio Enterprises' 900 number eight times in just over two weeks. She was upset first that the calls went through unhindered and second that they exposed her son to pornographic subject matter.

C. ***Audio Enterprises' Response***

17. In its January 5, 1988 response to the Bureau's December 7 letter of inquiry, Audio Enterprises admits that it did not use any of the methods of restricting access by children or nonconsenting adults contained in Section 64.201 of the rules. It asserts, however, that it could not comply because AT&T's 900 MAS resembles the NYT MAS addressed by the court in *Carlin II*. As described above at paragraph seven, the Second Circuit had stayed the Commission's rule in the New York Telephone area in October 1985 because the court was concerned that utilization of access codes was not the least burdensome restriction in NYT territory because NYT's MAS was a one-way system that did not have the interactive capability necessary to screen calls based on credit card numbers or access codes. Audio Enterprises argues that, since AT&T's 900 network also does not have interactive capability, the rule does not provide it with the least restrictive means of limiting access by children.

18. Audio Enterprises also suggests that there appear to be significant constitutional issues surrounding both the statute and the Commission's implementing rules. However, it does not specify what these issues are. Rather, it simply asserts that the statute and rule chill its free speech rights and that, therefore, enforcement of Section 223(b) and the implementing regulation is unconstitutional.

19. Audio Enterprises denies that its prerecorded messages contained the subject matter identified in the first complaint, but it has not provided the Commission with tapes or transcripts of the recordings played on July 26, 1987 to support its denial. It also avers that it fails to understand why the phrases quoted in the first complaint are obscene or indecent.[17] Audio Enterprises requests that the Commission provide a transcript of these messages so that it can evaluate whether the messages are indecent or obscene.[18] Finally, Audio Enterprises states that it is divesting themselves of the 900 line "so as to avoid any future problems."

D. ***Staff Investigation***

20. Upon receiving the complaints described above, the Bureau conducted an investigation. The Commission's Field Operations Bureau (FOB) in Washington, D.C., placed calls to Audio Enterprises' 900 line at various times from October 1987 to January 1988 and recorded the messages that were accessed.[19] These tape recordings were made during daytime hours, most often in the middle of the afternoon at a time when children could be expected to be capable of accessing the messages. These messages were readily accessible to any interstate caller regardless of the caller's age and the message provider did not require the use of a credit card or access code.[20] Each

time the FOB monitored interstate calls to Audio Enterprises' line, it found no compliance with Section 64.201.[21] Based on an analysis of these messages, the Bureau found sufficient support for the complaints filed against Audio Enterprises to send its December 7 letter of inquiry requesting an explanation.

II. DISCUSSION

A. *Statutory Framework*

21. Because this is the first time the Commission has brought formal enforcement actions for violations of Section 223(b), it is useful for us to provide a detailed explanation of our interpretation of the statute. This explanation is also important to carefully delineate an offense which implicates sensitive first amendment concerns.[22] As we interpret subsection 223(b)(1), a violation of that provision occurs under the following circumstances: (1) a person or entity transmits certain communications or permits facilities under his or her control to transmit such communications; (2) the transmission is by means of telephone,[23] either directly or by recording device; (3) the communications which are transmitted have been made available to persons under the age of 18 or nonconsenting adults; (4) the communications being transmitted are obscene; (5) the transmissions are interstate or within the District of Columbia; and (6) the transmissions are made for commercial purposes. The statute also requires that any such violations be undertaken "knowingly." The statute furthermore provides that even where all these conditions are present, a message provider which attempted to restrict the access of minors and nonconsenting adults by using a method approved by this Commission (as set forth in Section 64.201 of our rules) shall have an absolute defense to a Section 223(b)(1) prosecution.[24]

22. We do not believe that the statutory language in subsection (b)(1)(A) providing that the offending communications be made to a minor requires that, in enforcing the statute, we must prove a particular minor accessed a specific obscene communication on a particular day for each violation of the statute assessed.[25] While the statutory language may require us to establish that the message provider is making its obscene communications to minors, we believe we are permitted to base such a finding on the information and evidence contained in the complaint and produced through our own investigation of the message provider's operations and messages. In instances where this evidence reveals that (1) the message provider has over a period of time knowingly transmitted its sexually explicit message over the interstate telephone network without taking any effective measures to restrict access to certain callers; (2) children have in fact accessed the messages as alleged in the complaint; and (3) those messages are obscene, we believe that it is both reasonable based on our experience in this area and within our statutory authority to conclude that (a) children have accessed these messages we tape-recorded and (b) the message provider is making sexually explicit communications to minors in violation of Section 223(b)(1) on each day that our monitoring reveals this course of conduct has continued.

23. These conclusions are entirely reasonable as a logical matter in light of the pervasive nature of the interstate telephone network and the manner in which dial-it messages are transmitted over it. When a message provider makes its sexually explicit messages available for receipt over this network, as a general matter, anyone, including minors in other states, can readily access those messages by simply placing a call to the provider's number from virtually any telephone in any home. Thus, regardless of the fact that a particular provider may have established its message service to reach an adult audience, a message provider should know that unless it takes some effective measures (either those prescribed in our rules or otherwise) to restrict access by minors, in the course of transmitting its messages to adult callers on an unrestricted basis, it will in fact make the communications to minors which the statute prohibits. Our experience indicates, in fact, that minors can and do gain awareness of these numbers and, once having learned the numbers, they are able to gain unimpeded and repeated access to these messages. Indeed, once one child learns a number, as the complaint in this case alleges has occurred, it is logical to conclude that the number will quickly spread to the child's peers and schoolmates.

24. This approach to enforcing the statute is also supported by important practical considerations, as well as by the statutory language and legislative history. First, these recordings, accessed by the child through a private telephone call, are of an ephemeral nature and are often difficult to link to a particular child caller. Parents will often not learn of such calls until as much as a month later when they receive a telephone bill, by which time it is likely that the actual message accessed by the child, or any record of it, will not be available to the parent.[26] Unlike activities involving the unlawful distribution of certain printed materials or alcohol to minors, the crime of communicating obscene messages to minors over the telephone network does not generally leave any physical trace that can readily be converted to evidence on an individual case-by-case basis. As a result, an enforcement approach limited to instances in which a complainant filed a transcript or tape recording with us of the particular obscene message accessed by his child would not only be impractical, but would seriously vitiate the statute's effectiveness.[27]

25. The statutory language making "each *day* of violation" a separate violation lends further support to our interpretation of the statute. Section 223(b)(4)(A) (emphasis added). This characterization by Congress of a violation of the statute as a *period* of noncompliance rather than as a *specific* communication made to a specific minor is consistent with our conclusion that the failure to take measures to restrict access to minors will in fact result in the making of communications to minors, and that those communications will continue over the period in which that course of conduct (*i.e.*, the failure to take restrictive measures) continues.

26. In addition, we find ample support for our approach in the legislative history of Section 223(b)(1). In explicitly extending government regulation under Section 223 to reach adult-oriented dial-it services, section 223(b)(1)(A) as originally proposed, defined the offense (consistent with the formulation used in Section 223(a)), as the "mak[ing] (directly or by recording device) of any comment, request, suggestion, or proposal which is obscene, lewd, lascivious, filthy or indecent, regardless of whether the maker of such comment placed the call." H.R. Rep. No. 98-356, 98th Cong., 1st Sess. 3 (1983). The legislative history suggests that the final formulation of

Section 223(b)(1)(A) to ban "mak[ing] (directly or by recording device) any obscene or indecent communication . . . *to any person under eighteen years of age* or to any other person without that person's consent regardless of whether the maker of such communication placed the call," (emphasis added), reflected Congress' intent to ensure that its efforts to protect minors from salacious telephone messages were consistent with existing Supreme Court precedent regarding the regulation of sexually explicit speech. That is, Congress' concern was to restrict children's, but not adults', access.[28]

27. The language that the communications be made to minors need not, therefore, be interpreted as articulating, either explicitly or implicitly, a requirement that the Commission only enforce the statute by linking specific minors to specific obscene messages. Rather, the language reflects Congress' general intention to establish minors as a protected class requiring special treatment under the statute. In doing so, Congress was motivated by its recognition that these sexually explicit telephone messages were in fact easily accessible by children from any home by a simple telephone call, and that unless affirmative steps were taken to limit the ready availability of these messages, access by minors would in fact occur.[29] Our interpretation of the statute in this enforcement proceeding is, therefore, fully consistent with the nature of the problem which Congress perceived and the manner in which it attempted to address it.

28. Under our approach to enforcement of the statutory scheme discussed above, the allegations contained in the complaints we receive claiming that a particular minor has accessed sexually explicit messages serve an important evidentiary function. While such unsubstantiated allegations cannot conclusively establish that a message provider is not taking any steps to restrict minors' access to its messages, or that its messages are obscene, they do provide some evidence that a particular provider's messages are being accessed by minors and may be obscene. As such, we regard these complaints as an appropriate trigger for further Commission investigations into the manner of the provider's message operations and the nature of the messages provided to determine whether violations of Section 223(b)(1) have indeed occurred. These investigations provide us with direct evidence as to the accessibility and content of the messages. If that evidence reveals that on the days the FCC monitored the provider's operations the messages are in fact being transmitted to callers without any effective measures to restrict access by minors, and those messages are in fact adjudged to be consistently obscene, then we believe we have the basis to conclude for purposes of subsection 223(b)(1), in the absence of contrary evidence from the message provider, that the message provider has made obscene communications to minors on those days and that no defense to prosecution is available.[30]

29. We interpret the term "knowingly" as used in Section 223(b)(1) consistent with this view of the statutory scheme. In order to establish the level of *scienter* necessary to satisfy this element of the offense, we need not establish that a message provider specifically intended to use telephone facilities to make an obscene communication to a particular minor, or to minors in general, for commercial purposes on an interstate basis. Rather, we need only establish that the message provider knew or should have known that it was engaging in activities that could constitute a violation of the statute.[31] In this regard, we expect message providers to be aware of the manner and circumstances under which their telephone messages may be accessed. We also find that a message provider can reasonably be expected to be aware of the fact that children can and will access dial-it messages where there are no effective barriers to their doing so and that it should be held accountable for its failure to prevent such access. Furthermore, message providers in the business of transmitting sexually explicit telephone messages to callers for a fee can be expected to be aware of the content of the messages they are offering.

30. Thus, with respect to the content of the messages being transmitted, *scienter* under the statute requires only that the message provider know that the material contained in those messages was generally of a sexually explicit nature or character, not that the provider know that the material would be found to be "obscene" under the legal definition of that term.[32] With respect to the actual transmission of the sexually explicit messages to minors, *scienter* under the statute requires only that the message provider, who can be expected to know that its messages are readily accessible to all interstate callers, knows that it has taken no reasonably effective measures to limit the ability of children to access those messages on an interstate basis.[33]

31. Section 223(b)(1) also requires that the transmission of messages be made for "commercial purposes." This provision reflects congressional intent that the statute not be applied to purely private conversations. Congress did, however, intend the statute to apply, whenever the sexually explicit messages are not personal in nature and are transmitted in connection with a business enterprise. Congress made it clear that the "commercial purposes" language did not contemplate that the business overall must be profitable for either its interstate and/or intrastate operations, or that the business must have profited from calls made by minors before liability will attach. To the contrary, Senator Trible, during the Senate debate, said:

> that the term "for commercial purposes" in this amendment does not require that the party alleged to be in violation of section 223 be receiving a direct profit from the calls: rather calls which promote, advertise, or publicize a product, a service or other commercial activity would meet this broad "for commercial purposes" test.

129 Cong. Rec. S16867 (daily ed. Nov. 18, 1983). Representative Bliley, the sponsor of this legislation, echoed this interpretation. 129 Cong. Rec. H10559 (daily ed. Nov. 18, 1983). Given this intent to make the "commercial purposes" element broad, we do not believe that the Commission must prove that an enterprise is profitable or that a direct profit was earned on any calls placed by or transmitted to minors on an interstate basis. Therefore, it is sufficient under the term "for commercial purposes," that a message provider be engaged in the transmission of adult messages over the telephone network in connection with a business enterprise.

32. Consistent with the general approach outlined above, we have carefully evaluated the allegations contained in the complaint and the information obtained as a result of our investigation, and conclude that there has been an apparent violation of the statute in this case. Furthermore, because we find the activities which constitute the violation to be ongoing, we find the violation

to be a continuing one. We base this conclusion on: (1) the allegations in the complaint claiming that a minor has readily accessed defendant's sexually explicit messages on an interstate basis; (2) the fact that our investigation, which involved repeated calls to and tapings of defendant's messages, revealed unimpeded access to this service and the absence of any effective measures utilized by defendant to restrict interstate access by minors; (3) the fact that the messages taped during the course of our investigation were, in our estimation, obscene within the legal definition of that term; and (4) the fact that the defendant is offering its messages over telephone facilities as part of a business enterprise.

B. ***Audio Enterprises' Noncompliance***

33. Audio Enterprises does not dispute the following facts: (1) Audio Enterprises transmitted, or permitted to be transmitted from a telephone facility under its control, certain messages which were received by the FCC's FOB monitoring personnel and by other individuals as described in the subject complaints; (2) the transmissions were made by means of telephone; (3) the transmissions were made to persons under eighteen years old; (4) the transmissions were made on an interstate basis; and (5) the transmissions were made for commercial purposes. Moreover, Audio Enterprises does not claim to have required a credit card or access code prior to transmitting the messages. Audio Enterprises also fails to argue that it did not knowingly engage in conduct which we tentatively find to constitute violation of the statute. Thus, the only element of the offense which it appears to contest is whether its messages are obscene.

34. Audio Enterprises does not contest its lack of compliance with the Commission's rule. Instead it argues that the Commission's rule is unconstitutional as applied to it because AT&T's 900 system lacks interactive capability. While we acknowledge that AT&T's 900 system as presently configured for Audio Enterprises lacks interactive capability, we disagree that this prevents us from imposing sanctions on Audio Enterprises for failing to restrict access by children as required by the statute. Initially, we note that several alternative service arrangements exist throughout the country that are capable of accommodating restricted access using credit cards or access codes. Many state 976 mass announcement services have interactive capability. In addition, there is a wide variety of customer premises equipment available that a message provider could use, together with ordinary telephone lines, to implement an access code or credit card screening system.[34]

35. Further, there is no right to use AT&T's 900 service, as opposed to other services, to transmit dial-a-porn messages. Because of the clear goal contained in the statute to protect children from accessing sexually explicit materials, we cannot permit a message service provider to select and use a method of transmission that it knows to be incapable of complying with our rule and then defend against an enforcement action on the basis that the transmission medium it selected is incapable of restricting access. When the Second Circuit lifted its stay of the *Second Report and Order* for all areas of the country other than NYT territory, Audio Enterprises should have known that it should have taken steps to bring its message service into compliance with the dial-a-porn rule. If it could not do so, it should have made alternative service arrangements or requested that the court or the Commission stay the effectiveness of its rule until it could do so. It selected neither of these alternatives. Indeed, Audio Enterprises and other message providers using AT&T's 900 service, had ample opportunity during the course of our *Third Report and Order* to argue that access codes were unduly burdensome; but it did not do so. Parties cannot withhold information from an agency during a Rule Making and then later use that information to avoid complying with the rule adopted.[35]

36. Nothing in the first amendment entitles a speaker to utilize any communications medium available to it in any manner and under any terms and conditions it chooses. For example, the Supreme Court has specifically upheld government restriction of certain sexually explicit material to children based on the government's countervailing and compelling interest to protect the well-being of children.[36] The court in *Carlin III* recognized that there is a compelling federal interest in protecting children which justifies putting some restriction on the transmission of adult messages. It is entirely reasonable to require a dial-a-porn provider to choose a transmission service that permits compliance with the law.

37. It is important to note, moreover, that obscene speech is not protected under the Constitution[37] and generally can be banned outright. Section 223(b) is considerably more permissive than it need be in that it permits transmission of obscene speech to consenting adults while only restricting access by children and nonconsenting adults. Because obscene speech can be constitutionally prohibited altogether, even as to consenting adults, surely it is constitutional to require it to be transmitted only on those facilities that are capable of limiting access to consenting adults.

38. In any event, we disagree with Audio Enterprise's argument that the Section 64.201 methods of restricting access are not the least restrictive means available. We have exhaustively examined on three separate occasions various means of restricting access and concluded that our rule provides the least restrictive means which would also effectively protect children. The court in *Carlin II* upheld our rule for all areas of the country except NYT territory (and now *Carlin III* has affirmed it even as to New York). Audio Enterprise's response raises nothing new that we have not already considered in our dial-a-porn Rule Makings. What is more, Audio Enterprise's argument that this particular method is too burdensome appears disingenuous since defendant apparently made no attempt whatsoever to employ any restrictions on access. Therefore, we reject this argument and the attack on our rules and conclude that Audio Enterprises has not availed itself of the absolute defense provided for in Section 223(b)(2).[38]

39. Audio Enterprises also represents that it has now relinquished the particular 900 number called to avoid future problems. Our investigation reveals that the line was in fact transferred to another company on January 10, 1988, which commenced operation as another adult message service on that date. Although relinquishing the line ended what we tentatively have concluded was a continuing violation of Section 223(b) of the Act by Audio Enterprises, this decision does not remedy the fact that Audio Enterprises apparently was in violation of the statute. Substantial compliance at a later date does not vitiate earlier violations.[39]

40. Audio Enterprises also denies that the messages described in the complaint were messages transmitted on the 900 telephone number in question. This argument is

beside the point. In our evaluation, we have relied on the FOB tape recordings of Audio Enterprises' messages. The complaints indicate children have accessed Audio Enterprise's messages. No restrictions on access were in place during our calls to defendant's number. As previously stated, we can, therefore, reasonably conclude that children could and in fact did easily access the tape-recorded messages without any restrictions on a continuing basis. Furthermore, because of the fact that we found the numerous messages provided by defendants over their 900 line that we taped during the course of our investigation to be consistently obscene, we can reasonably conclude that the messages accessed by the minors described in the complaints (which of course those minors did not record), as well as by any other minors that may have called this number during the period of noncompliance with the statute, were obscene as well. As noted earlier, defendants have not alleged that their messages have varied in degree or kind over time. Therefore, we believe we have a reasonable basis to conclude that the defendants have violated the statute on the days we tape-recorded the messages.[40]

C. *Obscenity*

41. The only remaining element under Section 223(b) that we must consider in determining whether there has been a violation of Section 223(b) is whether the messages transmitted by defendant are obscene. We conclude that the messages transmitted by Audio Enterprises that we recorded during our investigation are obscene within the meaning of Section 223(b) and prevailing Supreme Court precedent. We have made numerous recordings over a period of time of Audio Enterprises' messages. We also note that, while we do not have a recording of the exact message transmitted by it on July 26, 1987 (when the first complainant alleges her child accessed Audio Enterprises' messages), Audio Enterprises has not alleged that its messages varied in degree or in kind at any time from that date through and including January 9, 1988, when we recorded their messages.[41]

42. Under *Miller v. California*, 413 U.S. 15 (1973), a work is obscene if

> (a) an average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (b) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable law;[42] and (c) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

413 U.S. at 24. Two of the three criteria for obscenity--whether a work appeals to the prurient interest and whether it is patently offensive--are to be judged according to contemporary community standards. *E.g., Smith v. United States*, 431 U.S. 291, 300-01 (1977). The third criterion--whether the works lacks serious value--is to be judged according to a reasonable person test. *Pope v. Illinois*, 107 S. Ct. 1918 (1987).

43. Before applying the first two criteria to the messages at issue here, we must address the meaning of the phrase "contemporary community standards," as interpreted by the Supreme Court. In *Miller*, the Supreme Court stated that its primary purpose in referring to contemporary community standards was to permit triers of fact to exercise their traditional function of making judgements based on their knowledge of the views of the average person in the community. *Miller v. California*, 413 U.S. at 30. In *Hamling v. United States*, 418 U.S. 87, 104-05 (1974), the Court also noted that, by referring to contemporary community standards in *Miller*, it did not intend to require, as a constitutional matter, the use of any precise geographic area in evaluating whether material satisfied the obscenity criteria. Rather, the Court stated that "a principal concern in requiring that a judgment be made on the basis of 'contemporary community standards' is to assure that the material is judged neither on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group."[43]

44. We note that, in the explication of the obscenity standard in the context of, for example, the enforcement of 18 U.S.C. § 1461 (prohibiting the mailing of obscene material), lower courts have focused on the local nature of the contemporary community standards criterion and the value of local determinations in the application of that criterion.[44] The focus on local community standards, however, has developed in the context of a judicial system capable of using local decisionmakers--either juries or judges--in criminal prosecutions against purveyors of obscenity. These cases may be inapplicable in the context of an administrative action by a national agency.[45]

45. As a result, we conclude that, as a constitutional matter, this agency may apply a broader contemporary community standard generally in the determination of whether messages made available on the interstate telephone network are obscene within the meaning of Section 223(b). Furthermore, we conclude that, as a policy matter, we will not attempt to approximate a local community standard in a Section 223(b) enforcement proceeding such as this, in which we have issued a notice of apparent liability without conducting a full hearing on the record.[46] We believe this conclusion is warranted for two reasons.

46. We note initially that in enacting Section 223(b), Congress indicated that it did not intend that the Commission be restricted to applying a local community standard in the enforcement of the provision:

> The Commission would not be obligated to admit evidence of community standards but it certainly could do so if such evidence is appropriate or necessary. The Commission should exercise care that it does not misrepresent Supreme Court cases by inserting local before community standards. The question of whether the Commission can or should make obscenity or indecency decisions is closed by the amendment.[47]

47. Further, it is important to note that, unlike *Miller* and most other obscenity cases, this proceeding is not a criminal prosecution. Although subsection (b)(1) of Section 223 authorizes the imposition of criminal sanctions, we are here proceeding administratively under our authority pursuant to Section 223(b)(4) of the Communications Act.[48] For the reasons stated above, we do not believe that, in the context of a Commission forfeiture proceeding involving Section 223(b), the application of a local community standard is necessary. Nor do we believe, in this context, that Commission application of a local standard is appropriate. Our ability to apply a standard based on a community outside of Washington, D.C.,

would appear to be somewhat limited. On the other hand, under Section 504(b)(6) of the Act, defendants can still avail themselves of a trial *de novo* in a local district court with respect to the enforcement of any forfeiture that may ultimately be assessed against them.[49] To the extent that a court might determine that a local standard would apply in this context, therefore, we believe that the Communications Act provides ample safeguards. Accordingly, we will not attempt to apply our own determination of a local community standard in the context of this case.

48. Applying the three criteria of the *Miller* definition, we believe that the messages at issue in this proceeding are indeed obscene.[50] First, we determine that, taken as a whole,[51] the messages appeal to the prurient interest of the average person.[52] Second, we find that, taken as a whole, they depict or describe, in a patently offensive way, the "hard core" sexual conduct specified by the Supreme Court in the *Miller* case.[53] Most if not all 27 recordings made during the Commission's investigation explicitly describe ultimate sexual acts of intercourse, both vaginal and anal, fellatio, masturbation, and oral stimulation of women's breasts in a patently offensive manner. These descriptions include vulgar and lewd characterizations of sexual acts or organs, including "dick," "come," "fuck," "bush," and "snatch." In one tape, the couple performs sexual acts in a glass elevator. In another scene described by the complainant, a woman has shampoo inserted into her vagina. Another graphically describes a man pouring mud on a naked woman's breasts, orally stimulating her nipples and urinating on her during sexual activity. These descriptions are highly vulgar and degrading and appear to us to be patently offensive and to go well beyond what an average adult person in any community would consider to be portrayals of sexual conduct worthy of protection. Third, we find that no reasonable person would conclude that the messages have any serious literary, artistic, political or scientific value. Accordingly, they appear, in our view, to be obscene within the meaning of the *Miller* definition. Thus, we conclude that, by providing these messages via telephone to persons under 18, which we have tentatively found to be consistently and repeatedly obscene, Audio Enterprises has apparently violated Section 223(b) of the Act.

49. In addition to concluding that Section 223(b) prohibits the transmission to persons under 18 communications that are obscene within the parameters established by the *Miller* definition, we also believe that the word "obscene" in Section 223(b) can be fairly interpreted to include messages that are "harmful to minors"– *i.e.*, obscene as to minors–consistent with the Supreme Court's holding in *Ginsberg v. New York*, 390 U.S. 629 (1968).[54] The principal goal of Section 223(b) is the protection of children.[55] On its face, the statute prohibits only the dissemination of certain communications to children.[56]

50. Furthermore, the legislative history of Section 223(b) indicates that Congress intended the provision, consistent with Supreme Court precedent, to protect children from exposure to sexually explicit communications on the interstate telephone network.[57] The Court has specifically recognized that material can be harmful or obscene as to minors, even though it might not be obscene as to adults.[58] In *Ginsberg*, therefore, it upheld the constitutionality of a state statute that prohibited the sale to minors of publications that were defined as harmful to minors, even though those publications were not obscene with respect to adults.

51. The Court in *Ginsberg* found that the state had a preeminent and legitimate interest in protecting minors from being exposed to sexually explicit materials that were harmful to minors.[59] Fashioning the then-prevailing definition of obscenity to one appropriate for minors, the Court upheld the state statute, which defined "harmful to minors" as follows:

> [T]hat quality of any description or representation, in whatever form, or nudity, sexual conduct, sexual excitement, or sadomasochistic abuse when it:
>
> (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and
>
> (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and
>
> (iii) is utterly without redeeming social importance for minors.[60]

The Court thus held that the Constitution permits the application of a variable definition of obscenity in the evaluation of government regulations that attempt to shield children from material that is harmful to them.

52. Congress, therefore, can constitutionally prevent children from gaining access to interstate telephone communications that are harmful to them. Accordingly, we believe that Congress intended this precise result and thereby intended that Section 223(b) reach communications that are "harmful to minors" when it prohibited the transmission of "obscene" communications to persons under 18 years of age.

53. Our interpretation of Section 223(b) is consistent with the *Carlin III* decision, which explicitly cited *Ginsberg* in acknowledging that Section 223(b) was designed to achieve the government's compelling interest in protecting children from certain sexually explicit messages. *Carlin III*, slip op. at 20. Furthermore, the court cited, with approval, recent decisions of courts of appeals that have upheld statutes attempting to restrict the display to minors of materials that are harmful to them. *Carlin III*, slip op. at 23, citing *Upper Midwest Booksellers v. Minneapolis*, 780 F.2d 1389 (8th Cir. 1985) (applying a variable definition of obscenity); *M. S. News Co. v. Casado*, 721 F.2d 1281 (10th Cir. 1983) (same). We therefore believe that our interpretation that Section 223(b) reaches material that is "harmful to minors," within the meaning of the *Ginsberg* case, is consistent with both congressional intent and the court's decision in *Carlin III*.

54. Applying this interpretation to the facts before us, we conclude that the material in our tape recordings appears harmful to minors. We note initially that the category of communications that are harmful to minors includes within it communications that are obscene, so that any obscene communication is necessarily harmful to minors.[61] Having concluded that the messages here are obscene as to adults, it therefore follows of necessity that they are also harmful as to minors. Nevertheless, we can reach this conclusion by applying the traditional criteria to these communications as well. First, we believe that the messages, taken as a whole, appeal to the prurient interest of minors. Second, having already determined that the messages portray sexual conduct in a patently offensive manner as measured by contemporary community standards--and for the reasons outlined in that discussion--we

have no difficulty concluding that the messages also portray such conduct in a manner that is patently offensive to prevailing standards in the contemporary adult community as a whole with respect to what is suitable material for minors. Finally, we find that no reasonable person could discern from the messages any serious literary, artistic, political or scientific value for minors. Accordingly, we find that the messages appear harmful or obscene as to minors within the meaning of the *Ginsberg* case, independently from our conclusion that they appear obscene as to adults within the meaning of the *Miller* case.

55. Finally, we conclude that the messages at issue here are "indecent" as we interpret the statute's use of that term. Although the Second Circuit in *Carlin III* construed Congress' use of the word "indecent" in Section 223(b) to reach only obscene communications, we disagree with that construction and believe that the legislative history to the statute makes clear that Congress intended the term "indecent" to have a meaning distinct from the term "obscene." 129 Cong. Rec. 10559 (daily ed. Nov. 18, 1983) (statement of Rep. Bliley). More specifically, we believe that the legislative history reveals that Congress intended the term "indecent" to be defined as that term was defined in an analogous context in 18 U.S.C. § 1464.[62] Accordingly, we believe that Section 223(b)'s use of the term "indecent" applies to communications that fall within the following definition:

> language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.

See id. See also Pacifica Foundation, Inc., 2 FCC Rcd 2698 (1987); *Infinity Broadcasting Corp.*, 2 FCC Rcd 1705 (1987); *Regents of the University of California*, 2 FCC Rcd 2703 (1987); order on reconsideration, *Infinity Broadcasting Corp.*, 3 FCC Rcd 930 (1987). Nevertheless, in recognition of the Second Circuit's ruling on this issue, we simply make the following determination with respect to these messages as a separate and alternative finding for whatever relevance it may have in any future proceedings. As noted above, our independent conclusions that these messages are obscene and harmful to minors are sufficient to sustain our action herein.

56. The messages at issue in this proceeding are indecent within the meaning of Section 223(b). As with messages that are harmful to minors, the category of communications that are indecent includes within it communications that are obscene, so that any obscene communication is necessarily indecent.[63] Having concluded that the messages here are obscene, it therefore follows that they are also indecent. The crucial distinction between indecent and obscene communications (including those communications that are harmful to minors) is that indecent communications need not appeal to the prurient interest, nor will the presence of serious literary, artistic, political or scientific value automatically preclude them from a finding of indecency. *See Infinity Broadcasting Corp.*, 3 FCC Rcd at 932, ¶ 17 (merit is simply one of many variables that make up a work's context). As discussed above, we have already determined that these messages, in context, depict and describe, in terms patently offensive as measured by contemporary community standards, sexual and excretory activities and organs. Hence, we reach independent conclusions that the messages at issue in this proceeding are indecent, harmful to minors and obscene within the meaning of Section 223(b).

III. APPLICATION OF STATUTE TO INDIVIDUALS

57. Although this Notice of Apparent Liability proposes fines against the corporation and not against any specific individuals, we believe that additional information concerning the involvement of specific individuals in the corporate activities which are the subject of this proceeding is necessary. This information will enable us to determine whether there are any company officials or other persons--such as those who have permitted telephone facilities under their control to be used to violate subsection (b)(1)(A)--who may have liability under the statute.[64] We therefore require that the corporation provide answers to the following questions within 30 days of the release of this Notice:

1. The corporation shall provide the following information for each director and/or officer of the corporation and for all other persons or agents who perform managerial functions or who act on behalf of the corporation, or are empowered to act on behalf of the corporation, or who have any other legal or equitable interest in the corporation:

a. full name;

b. address;

c. business telephone number;

d. address of principal office;

e. description of duties and services performed by each such individual for the corporation since October 6, 1987; if those duties or services have changed, specify each time period during which that individual performed those duties;

f. dates of service with the corporation;

g. description of the nature and the degree of individual's involvement in and responsibility for (i) deciding to provide message services from the line (900) 410-6749 and (ii) reviewing and/or creating individual tapes provided over that line; and

h. description of the nature and degree of the individual's involvement in and responsibility for selecting or not selecting (i) a method of restricting access to the message service by children and (ii) a method of restricting access consistent with Section 64.201 of the Commission's rules.

2. The corporation shall produce the following documents:

a. all public record documents relating to the establishment and registration of the corporation in the state of its corporation;

b. all documents which describe the duties and responsibilities of any officer or director of the corporation;

c. all documents which refer to a decision to start or continue to provide message services over the line (900) 410-6749;

d. all documents which refer to a decision to restrict or not restrict access to message services provided over the line (900) 410-6749; and

e. all documents which refer to the nature of the content of the messages provided over the line (900) 410-6749.

3. In addition to the documents requested in No. 2 above, the corporation shall produce any and all other documents in its possession relating to the activities of the corporation in connection with the corporation's provision of sexually explicit messages over the telephone network.

IV. COMPUTATION OF THE FINE

58. We here propose a fine on Audio Enterprises totalling 600,000. Based on the number of days obscene messages were transmitted, the amount could be much higher. Nevertheless, the amount of the fine is based on a variety of factors which have been weighed in order to determine what a reasonable fine is in the circumstances of this case. In making this assessment, we considered among other things factors such as the number of days the violation occurred, the steps taken in response to the Bureau's inquiry, and any history of any prior Commission offenses. Weighing these factors, we believe a fine of600,000 is reasonable on the facts of this case.

V. CONCLUSION

59. In our evaluation of possible violations of Section 223(b), we have relied on both the allegations in the complaints and the FOB tape recordings of Audio Enterprises' messages. The complaints suggest that some children have accessed its messages, and that no restrictions on access were in place when those calls to its number were made. The FOB has made over twenty calls to Audio Enterprises' number since October 6, 1987, and also found no restrictions in place during its calls. From these facts, we can reasonably conclude that, during the period we monitored, children could have easily accessed, and in fact did access, Audio Enterprises' tape-recorded messages without any restrictions on a continuing basis. Furthermore, because we found the numerous messages provided by Audio Enterprises over its 900 line that we taped during the course of our investigation to be, as outlined above, consistently obscene, we can reasonably conclude that the messages that were accessed by minors during the period of investigation in which no effective method of restricting access was utilized were obscene as well. As noted earlier, Audio Enterprises has not alleged that its messages have varied in manner, degree or kind during either the period covered by the complaint or our investigation. In conclusion, we find that we have a reasonable basis to conclude that Audio Enterprises violated Section 223(b) on the days its messages were recorded by this Commission.

VI. ORDERING CLAUSES

60. Accordingly, IT IS ORDERED, pursuant to Section 223(b) of the Communications Act, 47 U.S.C. § 223(b), that Audio Enterprises is apparently liable for a forfeiture of600,000 for knowingly making, by recording device, interstate obscene communication for commercial purposes to persons under eighteen years of age, in violation of Section 223(b) of the Act, 47 U.S.C. § 223(b).

61. IT IS FURTHER ORDERED that Audio Enterprises shall within thirty days of the release date of this notice pay the full amount of its fine or file a response showing why the forfeiture should not be imposed or the reason why the proposed forfeiture should be reduced.[65] If the fine is not paid, the response should include supporting evidence sufficient to rebut the tentative conclusions outlined in this notice.

62. IT IS FURTHER ORDERED that Audio Enterprises, Inc., shall, within 30 days of release of this Notice of Apparent Liability, respond to the question set forth in Section III.

63. IT IS FURTHER ORDERED that Audio Enterprises, Inc., shall, within 30 days of release of this Notice of Apparent Liability, produce tapes or transcripts of the messages provided by it over (900) 410-6749 on the dates and times that the complainants allege their children accessed Audio Enterprises' messages at that number.

64. IT IS FURTHER ORDERED that a copy of this Notice shall be sent by certified mail, return receipt requested, to Audio Enterprises.[66]

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

APPENDIX A
ENF-88-04

Telephone Number (900) 410-6749

10/6/87	10:55 a.m.
	4:38 p.m.
10/7/87	9:50 a.m.
	2:50 p.m.
10/8/87	4:05 p.m.
11/24/87	3:47 p.m.
12/1/87	4:22 p.m.
12/8/87	3:42 p.m.

12/9/87	4:31 p.m.
12/10/87	4:40 p.m.
12/11/87	4:19 p.m.
12/14/87	3:54 p.m.
12/15/87	4:48 p.m.
12/16/87	4:06 p.m.
12/17/87	4:17 p.m.
12/21/87	4:03 p.m.
12/22/87	4:54 p.m.
12/23/87	4:34 p.m.
12/24/87	3:47 p.m.
12/28/87	4:03 p.m.
12/29/87	4:26 p.m.
12/30/87	4:02 p.m.
12/31/87	4:06 p.m.
1/4/88	4:32 p.m.
1/5/88	4:47 p.m.
1/6/88	4:54 p.m.
1/7/88	4:28 p.m.

FOOTNOTES

[1] Section 223(b) states in pertinent part, that parties who knowingly and for commercial purposes, by means of telephone, transmit, or who allow telephones or telephone facilities under their control to be used to transmit, obscene communications to persons under 18 years of age or nonconsenting adults will be subject to certain penalties. *See infra* para. 5.

[2] Section 223(b) authorizes the Commission to impose certain fines for violations of Section 223(b) "after appropriate administrative proceedings." To assure the due process rights of Audio Enterprises, we will use as a guideline the procedures for forfeiture found in Section 1.80 of our rules, 47 C.F.R. § 1.80. However, the fine imposed herein is being imposed pursuant to Section 223(b) and not pursuant to Section 1.80.

[3] Section 64.201 contains the Commission-approved methods for restricting access to dial-a-porn messages by minors and nonconsenting adults. *See infra* para. 12.

[4] 129 Cong. Rec. H10,560 (daily ed. Nov. 18, 1983) (statement of Rep. Bliley).

[5] 129 Cong. Rec. S16,866 (daily ed. Nov. 18, 1983) (statement of Sen. Trible).

[6] On April 27, 1988, the President signed into law an amendment to Section 223(b) which bans all obscene or indecent communications in interstate communications or within the District of Colunbia. This amendment is effective July 1, 1988. This amendment does not affect this proceeding because the proposed fine is levied for Audio Enterprises' past violations of the law in effect at the time of the violations. We note that because we have concluded that Audio Enterprises' messages were apparently obscene, if the new statute had been in effect when the violations occurred, Audio Enterprises would have been in violation of the new statute.

[7] Inquiry into Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials (Dial-a-Porn Enforcement), FCC 84-253, 49 Fed. Reg. 24,996 (released June 19, 1984) (First Report and Order).

[8] Carlin Communications v. FCC, 749 F.2d 113 (2d Cir. 1984) (Carlin I).

[9] Because in the court's opinion the Commission's rules were content-based, it applied a stricter level of scrutiny than would be required for content-neutral regulations. Under this standard, the court required the rule to be the least burdensome alternative necessary to achieve a compelling governmental interest.

[10] Dial-a-Porn Enforcement, FCC 85-97, 50 Fed. Reg. 10,510 (released Mar. 8, 1985) (Second Notice of Proposed Rule Making).

[11] Dial-a-Porn Enforcement, FCC 85-554, 50 Fed. Reg. 42,699 (released Oct. 22, 1985) (Second Report and Order).

[12] Carlin Communications v. FCC, 787 F.2d 846 (2d Cir. 1986) (Carlin II).

[13] Dial-a-Porn Enforcement, 2 FCC Rcd 2714 (1987) (Third Report and Order).

[14] Carlin Communications v. FCC, 837 F.2d 546 (2d Cir. 1988) (Carlin III).

[15] A request for rehearing filed by Carlin Communications was denied by the Second Circuit on April 4, 1988. Thereafter, Carlin petitioned the court to stay the issuance of its mandate. The court granted a temporary stay of the issuance of its mandate on April 13, 1988. Subsequently, the court issued the mandate on May 6, 1988.

[16] The *Second Report and Order* provided for the use of credit cards and previously assigned access codes but did not include the scrambling option. We note, however, that had Audio Enterprises attempted to restrict children's access by scrambling its messages, we would have exercised our discretion to not take enforcement action. That was not the case, however. Instead, we have a situation where a message provider was taking none of the steps that we have indicated are sufficient to restrict children's access to dial-a-porn services.

[17] The phrases quoted in the complaint included: "Suck my nipples their [sic] getting so hard."; "Lick my bush."; "Oh come on finger me good."; and "Fuck me please come on, it feels so good."

[18] The staff has sent Audio Enterprises' counsel a copy of tape recordings the staff had made of some of defendant's messages at counsel's request. Letter from Keith G. Nichols, Jr., Enforcement Division, to Robert Harris (January 28, 1988).

[19] *See* Appendix A for a precise record of the dates and times of the FOB's calls. On January 10, 1988, one month after receiving the Common Carrier Bureau's letter of inquiry, Audio Enterprises divested itself of the line in question.

[20] Nor were the messages scrambled. As stated earlier, although the scrambling option was not technically in effect at that time, the Commission would have declined to take enforcement action against a message provider employing scrambling to limit children's access. The Commission's concern is with dial-a-porn services available indiscriminately to any caller, with effective measures taken to restrict children's access. Audio Enterprises has not suggested any willingness to scramble their messages.

[21] In the period of less than eleven months that Audio Enterprises operated the 900 number in question, AT&T's records show that Audio Enterprises received 3,662,455 calls totalling 15,227,069 minutes. At the rates of .50 for the first minute and.35 for each additional minute, Audio Enterprises generated total billings of5,864,342.40. AT&T's records also show that under a promotional compensation program offered by AT&T in its Tariff F.C.C. No. 1, § 5.1.4.A.5, Audio Enterprises received payments of649,978.14 during that time period.

[22] Although we recognize that our interpretation is not the only possible construction and application of the statute, we find that our approach reasonably resolves statutory issues, some of which Congress did not directly address, but which must be resolved in order for us to enforce the statute. Moreover, we believe our construction furthers the statutory purpose without contravening any express statutory language or statements of congressional intent. As such, this approach is a permissible one entitled to deference by reviewing courts. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843-46 (1984); *see also* NLRB v. United Food and Commercial Workers Union, 108 S. Ct. 413 (1987).

[23] The fact that the transmission was by recording device rather than by a live person whose message was being transmitted is irrelevant for purposes of falling under Section 223(b). Congress amended Section 223(b) precisely to cover the type of recorded message services involved in this case.

[24] *See also infra* note 33. Notwithstanding that failure to restrict access in accordance with 47 C.F.R. § 64.201 is not itself a violation of Section 223(b)(1), a message provider who ignores our rules does so at the risk of being found in violation of Section 223(b) if children are able to readily access that dial-a-porn service.

[25] Section 223(b)(4)(A) allows the Commission to assess civil fines of up to50,000 for each violation, and further provides that "each day of violation shall constitute a separate violation" for these purposes.

[26] As a general matter, the messages provided by adult message services are changed frequently. In this case, for example, our monitoring revealed that the defendant's messages were changed on a daily basis.

[27] Moreover, Congress could not have intended that we enforce the statute by relying solely on calls made by specific minors to adult message services which this agency had encouraged or facilitated in order to generate evidence. It would be anomalous indeed if an agency entrusted with the enforcement of a statute aimed at protecting minors from salacious telephone messages could fulfill that responsibility only by intentionally exposing children to those messages. Of course, should evidence become available that a child has accessed a particular message that we have tape-recorded, we would also be able to enforce the statute on the actual evidence that a child has accessed a particular recording either in this proceeding or in another.

[28] *See e.g.* 129 Cong. Rec. E5966 (daily ed. Dec. 14, 1983) (statement of Rep. Kastenmeier) ("In Butler, the Supreme Court struck down as unconstitutional a statute that had the effect of preventing adults from having access to materials judged to have a potentially deleterious influence on children. The Court explained that the statute would have reduced the adult population to reading only what was fit for child. The principle is equally applicable here, and so we have carefully constructed section 223, as amended, to avoid reducing the adult population to hearing only what is fit for a child. We leave it to the FCC to prescribe the specific regulations that *permit adult access while limiting children's access.* " (emphasis added)).

[29] *See* 129 Cong. Rec. H10560 (daily ed. Nov. 18, 1983) (statement of Rep. Bliley) ("Dial-it services are subject to the nuisance rational [sic] in Pacifica or under common law because of their indiscriminate availability to children. . . . [O]perators of attractive nuisances such as dial-a-porn must place a barrier between the offensive material and children. . . . *The availability of obscene material to children is the controlling factor in this amendment.* . . . The fact that children can call the number with no limitation is sufficient to impose the lesser standard. . . . The inability of parents to effectively control children's access to obscene material places a duty on the Government to intervene." (emphasis added)).

[30] Because the direct evidence on which we base our finding of apparent violations is limited to those days covered by our own investigation, the initial complaint, given its allegations that a minor had accessed sexually explicit messages, serves as a trigger for our investigation, rather than as a direct basis for our findings of apparent violation. In cases where a subsequent complaint alleges access by a minor on dates for which we have monitored the provider's operations and messages,the allegations contained in that later complaint provide additional probative evidence upon which to conclude that minors have actually accessed the provider's obscene messages in violation of the law during the monitoring period. In fact, after adopting this Notice of Apparent Liability, we received two more complaints alleging that children had indeed accessed Audio Enterprises' messages on 21 different days. Five of those days were days on which the FOB monitored Audio Enterprises' line and recorded its messages.

[31] Were we to interpret the term "knowingly" otherwise and allow a message provider's assertion that he never specifically intended to transmit his messages to a minor or minors to serve as a defense to prosecution under the statute in cases where those messages were in fact readily accessible to minors, the entire statutory purpose would be defeated. Message providers could readily avoid enforcement of the statute against them, and they would have no incentive to comply with the Commission's dial-a-porn regulation or take any other steps to restrict access to minors as Congress intended. A message provider offering tape recording to all callers indiscriminately will never know whether an individual caller is a minor or adult. Accordingly, we reject such an interpretation of "knowingly" that requires the message provider to intend that its message be transmitted to minors as unreasonable under the statutory scheme, because it would allow noncompliance without risk of prosecution by all dial-a-porn providers, in direct contravention of Congressional intent.

[32] *See* Ginsberg v. New York, 390 U.S. 629, 643-44 (1968); United States v. Smith, 467 F.2d 1126 (7th Cir. 1972).

[33] This case does not present a situation in which, although a message provider has not complied with one of our approved methods, access to its sexually explicit messages has nevertheless been effectively restricted in some other way, either by virtue of alternative actions taken by the message provider, or interstate blocking schemes that may restrict interstate access by minors. As discussed more fully below, the evidence in this case suggests that the message provider has been transmitting its sexually explicit telephone messages to all callers, including minors, without using one of our approved methods or any other reasonably effective measure to restrict access to minors. As a result, we conclude that defendant has no basis to claim that no "knowing" violations have occurred.

[34] In its reply comments to the Commission's *Third Notice of Proposed Rule Making*, AT&T explained that a personal identification number (PIN) system could be used to make noninteractive networks, such as AT&T's 900 service, interactive.

[35] Telocator v. FCC, 691 F.2d 525, 539 n.114 (1982).

[36] *See, e.g.*, Gregory v. City of Chicago, 394 U.S. 111 (1968); *see also* Pacifica Foundation v. FCC, 438 U.S. 727 (1978).

[37] Roth v. United States, 354 U.S. 476, 483 (1957).

[38] Audio Enterprises also argues that there are numerous constitutional and legal problems involved with enforcing Section 223(b) and the implementing rule. Because none of these arguments are delineated, we are unable to respond to them

except to say generally that for all the reasons set forth in our Rule Making proceedings and in our briefs to the Second Circuit, we believe both our rule and the statute are constitutional.

[39] Station KEVL, Inc., 42 FCC 2d 258 (1973); Executive Broadcasting Corp., 3 FCC 2d 699 (1966).

[40] We are here requiring Audio Enterprises to produce tapes and/or transcripts of the messages it transmitted on the dates and times that the minor who is the subject of the complaint is alleged to have accessed those messages. *See infra* para. 63. We also invite Audio Enterprises to submit tapes and transcripts of its messages on any other days Audio Enterprises believes may be relevant to its defense in this proceeding. This requirement is consistent with our normal burden-of-proof requirements which place the burden of going forward to produce evidence on the party which can be expected to have sole possession of the evidence. *See* Hughes Sports Network, Inc., 38 FCC 2d 1052 (1972).

[41] If it intends to make such claims, it should produce tapes or transcripts of the messages it offered at the date and times covered by the complaint.

[42] In the case of a federal obscenity statute, the Supreme Court has held that, unless otherwise specifically stated in the statute, the relevant conduct proscribed by a statute banning obscenity is the "hard core" activity described in the *Miller* decision. United States v. 12 200-ft. Reels of Film, 412 U.S. 123, 130 n.7 (1973), citing Miller v. California, 413 U.S. at 25. *See also* Hamling v. United States, 418 U.S. 87, 110-16 (1974).

[43] Hamling at 107. *See also* Miller v. California, 413 U.S. at 33; Smith v. United States, 431 U.S. at 305.

[44] *Id.*, citing United States v. Various Articles of Obscene Merchandise, Seizure No. 170, 750 F.2d 596 (7th Cir. 1984); United States v. Bagnell, 679 F.2d 826 (11th Cir. 1982), *cert. denied*, 460 U.S. 1047 (1983); United States v. Thomas, 613 F.2d 787 (11th Cir.), *cert. denied*, 449 U.S. 888 (1980); United States v. McManus, 535 F.2d 460 (8th Cir. 1976), *cert. denied*, 429 U.S. 1052 (1977).

[45] Applications of Video 44 for Renewal of WSNS-TV Channel 44, 3 FCC Rcd 757, 758 (1988) (hereinafter Video 44). Indeed, in *Video 44*, we noted that, in the past, the Commission undertook an obscenity determination in a broadcast case without focusing on a particular community and was upheld by the Court of Appeals. *Id.*, citing Sonderling Broadcasting Corp., 27 Rad. Reg. 2d (P&F) 285, *recon. denied*, 41 FCC 2d 777 (1973), *aff'd sub nom.* Illinois Citizens Committee for Broadcasting v. FCC, 515 F.2d 397 (D.C. Cir. 1975).

[46] We did not reach this issue in *Video 44* (We do not -- and need not -- decide here whether, as a policy matter, we might choose to attempt to approximate a more local community standard in an appropriate [broadcast] case presenting an obscenity issue.). 3 FCC Rcd at 758.

[47] 129 Cong. Rec. H10,560 (daily ed. Nov. 18, 1983) (remarks of Rep. Bliley).

[48] 47 U.S.C. § 223(b)(4).

[49] *See* 47 U.S.C. § 504(b)(6).

[50] In evaluating the claim of obscenity, we have not simply relied on the allegations contained in the complaints, but have also evaluated the tape recordings of messages that the staff has made. For the reasons stated herein, we believe that all of these messages are relevant in determining whether a violation of Section 223(b) has occurred.

[51] Although the transcripts on file with the FCC provide spoken words on the the tape recordings, we have evaluated the audio presentations of the messages themselves in making our obscenity evaluation. These presentations contain verbal inflections, such as heavy breathing and screams, that exacerbate the offensive and debasing portrayals of sexual activity and that are intended to portray actual sexual activity.

[52] The Supreme Court has defined prurient as "that which appeals to a shameful or morbid interest in sex." Brocket v. Spokane Arcades, Inc., 472 U.S. 491, 498 (1985); Roth v. United States, 354 U.S. 476, 487 n.20 (1957). We find that the messages, which consist entirely of detailed, repeated, explicit descriptions and simulations of a wide range of sexual activities, satisfy this definition. Indeed, the very purpose of those dial-a-porn messages is to appeal to the prurient interest.

[53] The Supreme Court, in *Miller*, gave examples of "patently offensive" depictions or descriptions of sexual conduct as follows:

> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions or masturbation, excretory functions, and lewd exhibition of the genitals.

Miller v. California, 413 U.S. at 25.

[54] *See also* Upper Midwest Booksellers v. Minneapolis, 780 F.2d 1389 (8th Cir. 1985) (applying a variable definition of obscenity); M.S. News v. Casado, 721 F.2d 1281 (10th Cir. 1983) (same). *See generally* Virginia v. American Booksellers Ass'n, 56 U.S.L.W. 4113 (U.S. Jan. 25, 1988) (No. 86-1034) (certifying questions to the Virginia Supreme Court as to the scope of a state statute regulating the display of material that is "harmful to minors").

[55] 129 Cong. Rec. H10,560 (daily ed. Nov. 18, 1983) (statement of Rep. Bliley); *id.* at S16,866 (statement of Sen. Trible).

[56] Although Congress could have constitutionally banned the commercial transmission of obscene communications altogether even to consenting adults, *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), it chose to prohibit those transmissions primarily to persons under 18, thereby underscoring the overall statutory scheme of protecting children. Although the statute protects nonconsenting adults as well, we believe that its express intention of protecting children provides an independent basis for concluding that the term "obscene" applies to material that is obscene as to minors.

[57] 129 Cong. Rec. E5966 (daily ed. Dec. 14, 1983) (remarks of Sen. Kastenmeier).

[58] Ginsberg v. New York, 390 U.S. 629 (1968).

[59] Because the statute did not ban the sale of such publications outright, but only restricted their sale to adults, the regulatory scheme did not run afoul of the constitutional principle announced in *Butler v. Michigan*, 552 U.S. 380 (1957), that, in an effort to protect the wellbeing of children, the state may not reduce the adult population to reading only that which is fit for children. Likewise, because the *Carlin III* court found that Section 223(b) and our regulations allow adult access to sexually explicit messages, while prohibiting access by children, we do not believe that this regulatory scheme violates the principle of *Butler*.

[60] Ginsberg v. New York, 390 U.S. at 646. At the time of *Ginsberg*, the prevailing obscenity definition was the one articulated in *A Book Named " John Cleland's Memoirs of a Woman of Pleasure " v. Commonwealth of Mass.*, 383 U.S. 413, 418-19 (1966) (quoting *Roth v. United States*, 354 U.S. 476 (1957)), which required material to be "utterly without redeeming value" in order to be obscene. In *Miller v. California*, the Supreme

Court refined the Memoirs definition to require only that the material lack "serious literary, artistic, political or scientific value." States have subsequently modified statutes regulating material that is harmful to minors to conform to a variation of the Miller definition. *See* Virginia v. American Booksellers Ass'n, 56 U.S.L.W. 4113 (U.S. Jan 25, 1988); Upper Midwest Booksellers v. Minneapolis, 780 F.2d 1389 (8th Cir. 1985); M.S. News Co. v. Casado, 721 F.2d 1281 (10th Cir. 1983).

[61] The converse, however, is not true in that not all communications that are harmful to minors are necessarily obscene.

[62] 129 Cong. Rec. H10559 (daily ed. Nov. 19, 1983) (statement of Rep. Bliley) (citing FCC v. Pacifica Foundation, 438 U.S. 726 (1978)).

[63] The converse, however, is not true in that not all indecent communications are necessarily obscene.

[64] *See* subsection 223(b)(1)(B), 47 U.S.C. § 223(b)(1)(B).

[65] Such a forfeiture amount should be paid by check or mail order drawn to the order of the Federal Communications Commission. The check or money order should be mailed to the Fee Collection Section, Finance Branch, Federal Communications Commission, Box 19032, Washington, D.C. 20036, or delivered to the Fee Collection Section, Room 209, 1919 M Street, N.W., Washington, D.C.

[66] A copy of the 27 tape-recorded messages we made has already been provided to counsel for Audio Enterprises. Letter from Keith G. Nichols, Jr., Enforcement Division, to David Bono (June 1, 1988).

SEPARTE STATEMENT OF COMMISSIONER PATRICIA DIAZ DENNIS

In Re: The Matter of Audio Enterprises, Inc., Apparent Liability for Forfeiture.

I write separately to state that *Video 44*, [1] a broadcasting case, is no authority for determining in this common carrier decision that the FCC may make obscenity determinations without reference to a particular community. *See Notice* at p. 23, fn. 45. In *Video 44*, I separately stated that the Commission should not, and could not, there reach the issue of what community standard was appropriate, because it was premature to do so.

I, nevertheless, find a national standard apropriate. This proceeding is to determine "apparent liability," which is the first of several steps which could include a trial *de novo* in federal district court. *See* 47 C.F.R. 1.80(f). At such a trial, a judge and/or a jury will be available, if appropriate, to apply a local community standard.

Another reason for now applying a national standard in this case is that the minors who accessed the California message service in question were in two other widely-separated states. At this stage of the proceedings, we have no basis for picking the standard of any one area as the relevant "community standard".

FOOTNOTE FOR STATEMENT

[1] Applications of Video 44 for Renewal of WSNS-TV Channel 44, 3 FCC Rcd 757 (1988)

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

INTERCAMBIO, INC., File No. ENF-88-03

Apparent Liability for Forfeiture

NOTICE OF APPARENT LIABILITY

Adopted: April 21, 1988; Released: July 6, 1988

By the Commission: Commissioner Dennis issuing a separate statement.

1. The Commission has before it a complaint filed on September 30, 1987, alleging that Intercambio, Inc., San Jose, California, transmitted obscene messages in violation of Section 223(b) of the Communications Act (Act), 47 U.S.C. § 223(b).[1] The complainant alleges that her sixteen-year-old son made over 280 calls to various dial-a-porn telephone numbers between June 24 and September 8, 1987, and that the nature of the subject matter communicated was obscene. Two of the numbers accessed on an interstate basis were (213) 976-7744 and (213) 976-7825 between July 25 and September 8, 1987. Pacific Bell's records show that these two lines have been leased to Intercambio since 1985 and 1986, respectively.

2. On December 7, 1987, the Common Carrier Bureau sent a letter to Intercambio requesting it to respond to the issues raised by the complaint to assist the Commission in determining whether and the extent to which violations of Section 223(b) may have occurred.[2] As discussed below, we conclude, based on the evidence before us, that the actions of Intercambio appear to be in violation of Section 223(b)(1)(A) and that it has not availed itself of the defenses set forth in Section 64.201 of the Commission's rules. 47 C.F.R. § 64.201. [3]

3. From October 19, 1987, through March 9, 1988, the Commission's investigation included tape recording of more than 100 calls to Intercambio's numbers. Each time we placed a call to Intercambio's numbers, we observed that Intercambio failed to use a Commission-approved method of restricting access. The Commission's calls were all placed from Washington, D.C., and were made on different days and during different times of the day. Every call placed by our investigators went through with easy, unimpeded access. At no time did the message service provider ever require an access code or credit card number before the messages could be accessed, or use any other effective method to restrict access. As a result, it does not appear that Intercambio can avail itself of any of the defenses set forth in our rules. We furthermore find that apparently the messages were provided by Intercambio in connection with a business enterprise (and hence "for commercial purposes" within the meaning of Section 223(b)) and that the messages we recorded are obscene within the legal definition of that term.

4. Under these circumstances, imposition of forfeiture penalties appears warranted. Section 223(b)(4) authorizes the Commission to impose a civil fine of up to50,000 per violation with each day of noncompliance constituting a separate violation. For the reasons explained below, we find that on each day we tape recorded messages, which began on October 19, 1987 and went through March 9, 1988, Intercambio apparently violated Section 223(b) and we propose to levy a fine on the Corporation of 600,000 for the violations. Although our contintuing monitoring reveals that Intercambio is still transmitting messages at the present time without using any effective method to restrict access, our review of the content of the messages we tape recorded, for purposes of this Notice of Apparent Liability, was limited to the time period between October 19, 1987 and March 9, 1988.

I. BACKGROUND

A. *The Statute and Implementing Rule*

5. In 1983 Congress amended Section 223 of the Communications Act, making the interstate transmission of obscene or indecent telephone calls to persons under the age of 18 or to nonconsenting adults a federal offense. Congress was responding to a concern that the nation's young people were being exposed to the offensive and damaging messages of the burgeoning "dial-a-porn" industry. Congress felt that the apparent inability of parents to effectively supervise their children's access to obscene dial-a-porn messages placed a duty on the government to intervene.[4] Congress indicated that the interest in protecting innocent children in such a situation was a compelling interest which justified regulation even in the sensitive area of constitutionally protected free speech rights.[5] Section 223(b), as amended, provides in pertinent part:

> (1) Whoever knowingly –
>
> (A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any obscene or indecent communication for commercial purposes to any person under eighteen years of age or to any other person without that person's consent, regardless of whether the maker of such communication placed the call; or
>
> (B) permits any telephone facility under such person's control to be used for any activity prohibited by subparagraph (A), shall be fined not more than50,000 or imprisoned not more than six months, or both.
>
> (2) It is a defense to a prosecution under this subsection that the defendant restricted access to the prohibited communication to persons eighteen years of age or older in accordance with procedures which the Commission shall prescribe by regulation.

* * * * *

(4)(A) In addition to the penalties under paragraphs (1) and (3), whoever, in the District of Columbia or in interstate or foreign communication, violates paragraph (1)(A) or (1)(B) shall be subject to a civil fine of not more than50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(B) A fine under this paragraph may be assessed either --

(i) by a court, pursuant to a civil action by the Commission or any attorney employed by the Commission who is designated by the Commission for such purposes, or

(ii) by the Commission after appropriate administrative proceedings.

47 U.S.C. § 223(b).[6]

6. In 1984, pursuant to the mandate of subsection (b)(2) of the the statute, the Commission first adopted Section 64.201 of the Commission's rules. After fully considering a number of different alternatives, the Commission established two methods of restricting access by children and nonconsenting adults.[7] Under the *First Report and Order*, a dial-a-porn provider would have a defense to an enforcement action brought under the statute: (1) by restricting the time obscene or indecent messages could be transmitted to 9:00 p.m. to 8:00 a.m. eastern time; or (2) by requiring payment by credit card prior to transmitting any messages. On November 2, 1984, the United States Court of Appeals for the Second Circuit accepted the credit card restriction, but invalidated the Commission's regulation insofar as it imposed time of day restrictions and remanded the case to the Commission for further proceedings.[8] The court agreed that protecting children from exposure to sexually explicit material is a compelling state interest. But it found the time channelling restriction to be both overinclusive, in that it restricted access to adult messages by adults during the day, and underinclusive, in that it failed to restrict access by children during the late evening hours.[9] Because it found the rule unconstitutional, the court declined to address the question of the constitutionality of the underlying statute.

7. In response to the court's remand, the Commission adopted a *Second Notice of Proposed Rule Making* proposing a number of additional methods of restricting access by children and nonconsenting adults.[10] After reviewing numerous comments from message service providers, telephone companies and other interested parties, the Commission adopted a new Section 64.201 in the *Second Report and Order*.[11] In that order, the Commission adopted a rule requiring dial-a-porn providers to restrict children's access by requiring either a credit card number or an access code before the message could be heard. The access code would be available only to adults who requested one by written application. The Commission thoroughly examined all the options it proposed, as well as others proffered by interested parties, and concluded that the credit card and access code options were the only options then currently available which were effective, feasible and could meet the strict scrutiny standard enunciated by the court. The Second Circuit again stayed the effectiveness of Section 64.201 pending a decision on the merits.

8. On April 11, 1986, the Second Circuit Court of Appeals held that the access code and credit card options were both effective and constitutional methods of restricting access by children and nonconsenting adults to obscene or indecent communications.[12] Nevertheless, it continued its stay for message services, such as Carlin Communications, in New York Telephone (NYT) territory because it found that NYT's mass announcement service (MAS) lacked the interactive capability necessary to accommodate either the credit card or access code requirements. It remanded the case to the Commission to consider whether less burdensome methods of restricting access were feasible in NYT territory. For the rest of the country, however, Section 64.201 was effective as of April 11, 1986.

9. After soliciting a third round of comments from interested parties, the Commission adopted the *Third Report and Order* on April 16, 1987.[13] The *Third Report and Order* did not disturb the findings of the *Second Report and Order* as to the effectiveness of the access code and credit card options for the rest of the country. The *Third Report and Order* also extended those two methods of restricting access for message services using telephone numbers in NYT territory based on NYT's representation that it planned changes to its MAS facilities which would incorporate the interactive capability necessary for these two options to be feasible methods of restricting access. The *Third Report and Order* also adopted a third method for restricting access that would be available nationwide: scrambling the adult message so that only an adult with a descrambler could access the message. Finally, regardless of which option the message provider selected, the Commission also required message providers subscribing to a MAS tariffed at this Commission to request the carrier to identify in the customer's telephone bill that a particular call was to an adult message service. On July 10, 1987, the Second Circuit stayed the effectiveness of the *Third Report and Order* pending a decision on the merits, thereby staying implementation of access codes in NYT territory and scrambling nationwide.

10. On January 15, 1988, the Second Circuit issued its decision upholding the validity of the rule adopted in the *Third Report and Order*.[14] It found that all three options were effective and feasible in restricting access and were the least restrictive means of limiting access to adult message services by children and nonconsenting adults available at that time. The court announced, however, that it would not issue its mandate in the case for 90 days in order to give message providers in New York time to comply with the rule.

11. Having concluded that the Commission's rule was valid, the court considered for the first time the constitutionality of the underlying statute. It concluded that Section 223(b) is constitutional insofar as it regulates obscene speech. With respect to the term "indecent," the court stated that it did not believe that Congress intended it to have a separate meaning from "obscene." However, regardless of Congress' intent, the court concluded that, for purposes of telephone communications, indecency was not a separate category of speech which the government could constitutionally regulate. Thus, to uphold the constitutionality of the statute, the court read the term "indecent" out of the statute.[15] Therefore, Section 223(b), as interpreted by the Second Circuit, currently only proscribes transmission of obscene messages to children and nonconsenting adults.

12. Since the rule adopted in the *Third Report and Order* was not yet in effect at the time of the transmissions at issue before us, we are proceeding in this case based on the rule adopted in the *Second Report and Order* which has been in effect since April 1986 in all parts of the country outside of NYT territory.[16] The rule adopted in that order, which was in effect at the time of this apparent violation, provided:

> It is a defense to prosecution under Section 223(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 223(b) (1983), that the defendant has taken either of the following steps to restrict access to the communications prohibited thereunder:
>
> (a) Requires an authorized access or identification code before transmission of the subject message begins, where the defendant
>
> (1) Has issued the code by mailing it to the applicant after reasonably ascertaining through receipt of a written application that the applicant is not under eighteen years of age; and
>
> (2) Has established a procedure to cancel immediately the code of any person upon written, telephonic or other notice to the defendant's business office that such code has been lost, stolen, or used by a person or persons under the age of eighteen, or that such code is no longer desired; or
>
> (b) Requires payment by credit card before transmission of the message.

47 C.F.R. § 64.201 (1986).

B. ***The Complaint***

13. The complaint was filed in September 1987. The complainant resides in Connecticut and alleges that during the period from June 24 to September 8, 1987, her sixteen-year-old son placed over 280 calls to various dial-a-porn numbers. Two of those numbers, (213) 976-7825 and (213) 976-7744, were leased by Pacific Bell Telephone Company to Intercambio in California.

14. Complainant expresses surprise that a child can call dial-a-porn numbers anywhere in the country at any time and gain access with little or no restriction. She states that in Connecticut, pornographic magazines are required to be kept behind store counters to be sold only upon proof of legal age and wonders why access to dial-a-porn lines is not similarly restricted. Complainant asserts that the numbers are so easily obtained that a nine-year-old was passing one along to all his friends at a local school.

15. Complainant expresses concern over the long-term effect that listening to dial-a-porn messages may have on children. She states that since her son made the calls, she has seen disturbing changes in the way he relates to women, and claims that he has "los[t] all respect for women in general, but particularly the young girls he had been dating." According to the complaint, her son is now seeing a psychiatrist on a weekly basis.

C. ***Intercambio's Response***

16. In its January 20, 1988 response to the Bureau's December 7 letter of inquiry, Intercambio denies any violation of Section 223(b) to the extent that it has not knowingly transmitted interstate obscene communications to persons under eighteen years of age. It claims that it has intended to offer only an intrastate service and that it has made good faith efforts to limit access to its services by placing advertising in specific adult print materials to narrowly target adults in the Los Angeles area and by preceding each message with a warning that minors should hang up.

17. Intercambio suggests that there appear to be significant constitutional issues surrounding both the statute and the Commission's implementing rules. Specifically, it states that the Commission will have to determine that Intercambio's messages were obscene, prove that Intercambio knowingly transmitted obscene communications to a minor, and show that Intercambio transmitted the communications for commercial purposes. It contends that Section 223(b) and the Commission's associated rules are unconstitutional to the extent that the defenses provided in Section 64.201 of the rules are not the least restrictive alternative methods of limiting access.

18. Intercambio admits that it did not use any of the methods of restricting access by children or nonconsenting adults contained in Section 64.201 of the Commission's rules. It asserts, however, that not availing itself of a Section 64.201 defense is, by itself, insufficient to prove that it violated Section 223(b) of the Act. It also claims that its noninteractive equipment prevents it from using access codes or credit card payments as restrictive methods and that the steps it took to limit its provision of services to Los Angeles area adults provide a fully adequate defense to prosecution under Section 223(b). It asserts that enforcement against Intercambio under Section 223(b) would be unlawful and burdensome and suggest that the Commission simply support its continued attempts to limit access. In addition to the technical limitations described above, it claims that the uncertainty of FCC regulations and ongoing California Public Utilities Commission proceedings have effectively frustrated it from complying with the Commission's rules.

19. Finally, Intercambio argues that enforcing Section 223(b) against it is unnecessary because Pacific Bell will soon implement blocking of 976 numbers and also intends to offer a new 900 service that will prohibit interstate access to information access services in California. It urges the Commission to defer action pending implementation of these options.

D. ***Staff Investigation***

20. Upon receiving the complaint described above, the Bureau conducted an investigation. The Commission's Field Operations Bureau (FOB) in Washington, D.C., telephoned the Intercambio 976 lines at various times from October 19, 1987 to March 9, 1988 and recorded the messages that were accessed.[17] These tape recordings were made during daytime hours, most often in the middle of the afternoon at a time when children could be expected to be capable of accessing the messages. These messages were readily accessible to any interstate caller regardless of the caller's age and the message provider did not require the use of a credit card or access code.[18] Each time the FOB monitored interstate calls to Intercambio's lines, it found no compliance with Section 64.201.[19] Based on an analysis of these messages, the Bureau found sufficient support for the complaint filed against Intercambio to send its December 7 letter of inquiry requesting an explanation.

II. DISCUSSION

A. *Statutory Framework*

21. Because this is the first time the Commission has brought formal enforcement actions for violations of Section 223(b), it is useful for us to provide a detailed explanation of our interpretation of the statute. This explanation is also important to carefully delineate an offense which implicates sensitive first amendment concerns.[20] As we interpret subsection 223(b)(1), a violation of that provision occurs under the following circumstances: (1) a person or entity transmits certain communications or permits facilities under his or her control to transmit such communications; (2) the transmission is by means of telephone,[21] either directly or by recording device; (3) the communications which are transmitted have been made available to persons under the age of 18 or nonconsenting adults; (4) the communications being transmitted are obscene; (5) the transmissions are interstate or within the District of Columbia; and (6) the transmissions are made for commercial purposes. The statute also requires that any such violations be undertaken "knowingly." The statute furthermore provides that even where all these conditions are present, a message provider which attempted to restrict the access of minors and nonconsenting adults by using a method approved by this Commission (as set forth in Section 64.201 of our rules) shall have an absolute defense to a Section 223(b)(1) prosecution.[22]

22. We do not believe that the statutory language in subsection (b)(1)(A) providing that the offending communications be made to a minor requires that, in enforcing the statute, we must prove that a particular minor accessed a specific obscene communication on a particular day for each violation of the statute assessed.[23] While the statutory language may require us to establish that the message provider is making its obscene communications to minors, we believe we are permitted to base such a finding on the information and evidence contained in the complaint and produced through our own investigation of the message provider's operations and messages. In instances where this evidence reveals that (1) the message provider has over a period of time knowingly transmitted its sexually explicit message over the interstate telephone network without taking any effective measures to restrict access to certain callers; (2) children have in fact accessed the messages as alleged in the complaint; and (3) those messages are obscene, we believe that it is both reasonable based on our experience in this area and within our statutory authority to conclude that (a) children have accessed the messages we tape-recorded, and (b) the message provider is making sexually explicit communications to minors in violation of Section 223(b)(1) on each day that our monitoring reveals this course of conduct has continued.

23. These conclusions are entirely reasonable as a logical matter in light of the pervasive nature of the interstate telephone network and the manner in which dial-it messages are transmitted over it. When a message provider makes its sexually explicit messages available for receipt over this network, as a general matter, anyone, including minors in other states, can readily access those messages by simply placing a call to the provider's number from virtually any telephone in any home. Thus, regardless of the fact that a particular provider may have established its message service to reach an adult audience, a message provider should know that unless it takes some effective measures (either those prescribed in our rules or otherwise) to restrict access by minors, in the course of transmitting its messages to adult callers on an unrestricted basis, it will in fact make the communications to minors which the statute prohibits. Our experience indicates, in fact, that minors can and do gain awareness of these numbers and, once having learned the numbers, they are able to gain unimpeded and repeated access to these messages. Indeed, once one child learns a number, as the complaint in this case alleges has occurred, it is logical to conclude that the number will quickly spread to the child's peers and schoolmates.

24. This approach to enforcing the statute is also supported by important practical considerations, as well as by the statutory language and legislative history. First, these recordings, accessed by a child through a private telephone call, are of an ephemeral nature and are often extremely difficult to link to a particular child caller. Parents will often not learn of such calls until as much as a month later when they receive a telephone bill, by which time it is likely that the actual message accessed by the child, or any record of it, will not be available to the parent.[24] Unlike activities involving the unlawful distribution of certain printed materials or alcohol to minors, the crime of communicating obscene messages to minors over the telephone network does not generally leave any physical trace that can readily be converted to evidence on an individual case-by-case basis. As a result, an enforcement approach limited to instances in which a complainant filed a transcript or tape recording with us of the particular obscene message accessed by his child would not only be impractical, but would vitiate the statute's effectiveness.[25]

25. The statutory language making "each *day* of violation" a separate violation lends further support to our interpretation of the statute. Section 223(b)(4)(A) (emphasis added). This characterization by Congress of a violation of the statute as a *period* of noncompliance rather than as a *specific* communication made to a specific minor is consistent with our conclusion that the failure to take measures to restrict access to minors will in fact result in the making of communications to minors, and that those communications will continue over the period in which that course of conduct (*i.e.*, the failure to take restrictive measures) continues.

26. In addition, we find ample support for our approach in the legislative history of Section 223(b)(1). In explicitly extending government regulation under Section 223 to reach adult-oriented dial-it services, section 223(b)(1)(A) as originally proposed, defined the offense (consistent with the formulation used in Section 223(a)), as the "mak[ing] (directly or by recording device) of any comment, request, suggestion, or proposal which is obscene, lewd, lascivious, filthy or indecent, regardless of whether the maker of such comment placed the call." H.R. Rep. No. 98-356, 98th Cong., 1st Sess. 3 (1983). The legislative history suggests that the final formulation of Section 223(b)(1)(A) to ban "mak[ing] (directly or by recording device) any obscene or indecent communication . . . *to any person under eighteen years of age* or to any other person without that person's consent regardless of whether the maker of such communication placed the call," (emphasis added), reflected Congress' intent to ensure that its efforts to protect minors from salacious telephone messages were consistent with existing Supreme

Court precedent regarding the regulation of sexually explicit speech. That is, Congress' concern was to restrict children's, but not adults', access.[26]

27. The language that the communications be made to minors need not, therefore, be interpreted as articulating, either explicitly or implicitly, a requirement that the Commission only enforce the statute by linking specific minors to specific obscene messages. Rather, the language reflects Congress' general intention to establish minors as a protected class requiring special treatment under the statute. In doing so, Congress was motivated by its recognition that these sexually explicit telephone messages were in fact easily accessible by children from any home by a simple telephone call, and that unless affirmative steps were taken to limit the ready availability of these messages, access by minors would in fact occur.[27] Our interpretation of the statute in this enforcement proceeding is, therefore, fully consistent with the nature of the problem that Congress perceived and the manner in which it attempted to address it.

28. Under our approach to enforcement of the statutory scheme discussed above, the allegations contained in the complaints we receive claiming that a particular minor has access sexually explicit messages serve an important evidentiary function. While such unsubstantiated allegations cannot conclusively establish that a message provider is not taking any steps to restrict minors' access to its messages, or that its messages are obscene, they do provide some evidence that a particular provider's messages are being accessed by minors and may be obscene. As such, we regard these complaints as an appropriate trigger for further Commission investigations into the manner of the provider's message operations and the nature of the messages provided to determine whether violations of Section 223(b)(1) have indeed occurred. These investigations provide us with direct evidence as to the accessibility and content of the messages. If that evidence reveals that on the days the FCC monitored the provider's operations the messages are in fact being transmitted to callers without any effective measures to restrict access by minors, and those messages are in fact adjudged to be consistently obscene, then we believe we have the basis to conclude for purposes of subsection 223(b)(1), in the absence of contrary evidence from the message provider, that the message provider has made obscene communications to minors on those days and that no defense to prosecution is available.[28]

29. We interpret the term "knowingly" as used in Section 223(b)(1) consistent with this view of the statutory scheme. In order to establish the level of *scienter* necessary to satisfy this element of the offense, we need not establish that a message provider specifically intended to use telephone facilities to make an obscene communication to a particular minor, or to minors in general, for commercial purposes on an interstate basis. Rather, we need only establish that the message provider knew or should have known that it was engaging in activities that could constitute a violation of the statute.[29] In this regard, we expect message providers to be aware of the manner and circumstances under which their telephone messages may be accessed. We also find that a message provider can reasonably be expected to be aware of the fact that children can and will access dial-it messages where there are no effective barriers to their doing so and that it should be held accountable for its failure to prevent such access. Furthermore, message providers in the business of transmitting sexually explicit telephone messages to callers for a fee can be expected to be aware of the content of the messages they are offering.

30. Thus, with respect to the content of the messages being transmitted, *scienter* under the statute requires only that the message provider know that the material contained in those messages was generally of a sexually explicit nature or character, not that the provider know that the material would be found to be "obscene" under the legal definition of that term.[30] With respect to the actual transmission of the sexually explicit messages to minors, *scienter* under the statute requires only that the message provider, who can be expected to know that its messages are readily accessible to all interstate callers, knows that it has taken no reasonably effective measures to limit the ability of children to access those messages on an interstate basis.[31]

31. Section 223(b)(1) also requires that the transmission of messages be made for "commercial purposes." This provision reflects congressional intent that the statute not be applied to purely private conversations. Congress did, however, intend the statute to apply whenever the sexually explicit messages are not personal in nature and are transmitted in connection with a business enterprise. Congress made it clear that the "commercial purposes" language did not contemplate that the business overall must be profitable for either its interstate or intrastate operations, or that the business must have profited from calls made by minors, before liability under the statute will attach. To the contrary, Senator Trible, during the Senate debate, said:

> that the term "for commercial purposes" in this amendment does not require that the party alleged to be in violation of section 223 be receiving a direct profit from the calls: rather calls which promote, advertise, or publicize a product, a service or other commercial activity would meet this broad "for commercial purposes" test.

129 Cong. Rec. S16867 (daily ed. Nov. 18, 1983). Representative Bliley, the sponsor of this legislation, echoed this interpretation. 129 Cong. Rec. H10559 (daily ed. Nov. 18, 1983). Given this intent to make the "commercial purposes" element broad, we do not believe that the Commission must prove that an enterprise is profitable or that a direct profit was earned on any calls placed by or transmitted to minors on an interstate basis. Therefore, it is sufficient under the term "for commercial purposes," that a message provider be engaged in the transmission of adult messages over the telephone network in connection with a business enterprise.

32. Consistent with the general approach outlined above, we have carefully evaluated the allegations contained in the complaint and the information obtained as a result of our investigation, and conclude that there has been an apparent violation of the statute in this case. Furthermore, because we find the activities which constitute the violation to be ongoing, we find the violation to be a continuing one. We base this conclusion on: (1) the allegations in the complaint claiming that a minor has readily accessed defendant's sexually explicit messages on an interstate basis; (2) the fact that our investigation, which involved repeated calls to and tapings of defendant's messages, revealed unimpeded access to this service and the absence of any effective measures utilized by

defendant to restrict interstate access by minors; (3) the fact that the messages taped during the course of our investigation were, in our estimation, obscene within the legal definition of that term; and (4) the fact that the defendant is offering its messages over telephone facilities as part of a business enterprise.

B. ***Intercambio's Noncompliance***

33. Intercambio does not dispute the following facts: (1) Intercambio transmitted, or permitted to be transmitted from a telephone facility under its control, certain messages which were received by the FCC's FOB monitoring personnel and by other individuals as described in the subject complaint; (2) the transmissions were made by means of telephone; and (3) the transmissions were interstate. Moreover, Intercambio does not claim to have required a credit card or access code prior to transmitting the messages. It does argue that it did not intend to transmit messages interstate or to transmit messages to children, and further that any of the messages which may have been intercepted by minors on an interstate basis were not made for commercial purposes. Intercambio does not, however, argue that it did not knowingly engage in the conduct which we tentatively find to constitute a violation of the statute.

34. Intercambio also does not contest its lack of compliance with the Commission's rule. Instead it asserts that its equipment has no interactive capability and is limited to passive functions such as playing recorded messages. It argues that implementation of the Commission's rule requiring access codes would have imposed an undue financial burden on Intercambio.[32] Imposing such a requirement would force Intercambio to replace its passive equipment with interactive equipment, to extensively advertise the new access codes and to establish a procedure for assigning and maintaining users' access codes. Intercambio further argues that the access code requirement would have a chilling effect on potential adult callers that would cause a severe decline in Intercambio's business. We do not agree that the fact that Intercamio's equipment lacks interactive capability excuses its failure to restrict access by children as required by the statute. Pacific Bell's 976 mass announcement services have interactive capability and a wide variety of customer premises equipment is available which a message provider could use together with ordinary telephone lines to implement an access code or credit card screening system.[33]

35. Because of the clear goal of the statute to protect children from accessing sexually explicit materials, we cannot permit a message service provider to select and use message transmission equipment that it knows to be incapable of complying with our rule and then defend against an enforcement action on the basis that the equipment it selected for its use is incapable of restricting access. When the Second Circuit lifted its stay of the *Second Report and Order* for all areas of the country other than NYT territory,[34] Intercambio should have known that it should have taken steps to bring its message service into compliance with the dial-a-porn rule. If it could not do so, it should have made alternative service arrangements or requested that the court or the Commission stay the effectiveness of its rule until it could do so. It selected neither of these alternatives. Indeed, Intercambio had ample opportunity during the course of our *Third Report and Order* to argue that access codes were unduly burdensome; but it did not do so. Parties cannot withhold information from an agency during a Rule Making and then later use that information to avoid complying with the rule adopted.[35]

36. Nothing in the first amendment entitles a speaker to utilize any communications medium available to it in any manner and under any terms and conditions it chooses. For example, the Supreme Court has specifically upheld government restriction of certain sexually explicit material to children based on the government's countervailing and compelling interest to protect the well-being of children.[36] The court in *Carlin III* recognized that there is a compelling federal interest in protecting children that justifies putting some restriction on the transmission of adult messages. It is entirely reasonable, therefore, to require a dial-a-porn provider to choose transmission methods and equipment that permit compliance with the law.

37. It is important to note, moreover, that obscene speech is not protected under the Constitution[37] and generally can be banned outright. Section 223(b) is considerably more permissive than it need be in that it permits transmission of obscene speech to consenting adults while only restricting access by children and nonconsenting adults. Because obscene speech can be constitutionally prohibited altogether, even as to consenting adults, surely it is constitutional to require it to be transmitted only on those facilities that are capable of limiting access to consenting adults.

38. In any event, we disagree with Intercambio's argument that the Section 64.201 methods of restricting access are not the least restrictive means available. We have exhaustively examined on three separate occasions various means of restricting access and concluded that our rule provides the least restrictive means which would also effectively protect children. The court in *Carlin II* upheld our rule for all areas of the country except NYT territory (and now *Carlin III* has affirmed it even as to New York). Intercambio's response raises nothing new that we have not already considered in our dial-a-porn Rule Makings. It claims that its use of warnings preceding messages and advertising narrowly targeted to adults represents substantial steps to restrict access by minors. We disagree. While we acknowledged in our *Second Report and Order* that disclaimer messages might be useful enhancements to our regulation and to parental supervisory efforts, we also stated that we did not believe that they would satisfy Congress' mandate, and we therefore rejected such an approach. We can take official notice that a minor intentionally calling Intercambio's dial-a-porn number would not heed the warning to hang up. Indeed, we specifically declined to adopt warning messages as one of our methods of restricting access on this ground.[38] To the contrary, we found that the warning would only serve to entice most children.[39] With respect to Intercambio's targeted advertising, there is no showing that minors are unable to obtain copies of publications containing its ads. Indeed, we can take official notice that in Los Angeles, many so-called "adult newspapers" are readily available from vending machines on the street. It is the Commission's opinion that the steps taken by Intercambio to limit access are ineffective. Therefore, we reject this argument and the attack on our rules and conclude that Intercambio has not availed itself of the absolute defense provided for in Section 223(b)(2) and that the other steps it has taken in no way relieve it from liability under Section 223(b)(1).

39. Intercambio also alleges that because of an ongoing proceeding before the California Public Utilities Commission (CPUC),[40] it has been unable to determine the appropriate method of restricting access to its service and, thus, should not be held liable for violations made in the summer of 1987. As discussed above, Intercambio should have known since 1986 of the Commission's dial-a-porn regulations and the steps it should have taken to clearly avoid prosecution under Section 223(b). Uncertainty as to state regulation does not excuse it from complying with an applicable federal statute, particularly since it admits that it knew its service was capable of being accessed interstate. Indeed, it has not stopped or altered its transmissions even after being notified by the Commission that we were investigating a possible violation of Section 223(b).

40. We also reject Intercambio's argument that the Commission should take no action to enforce Section 223(b) at this time since it hopes to move its message services to a new intrastate 900 service that cannot be accessed interstate. Although this new service would take any future transmissions outside the jurisdiction of the FCC under Section 223(b) since no interstate transmission of message would be possible, future action does not rectify past violations. As a result of the information contained in the complaint and our own investigation, we have proof that obscene messages were transmitted that were easily accessible by children and nonconsenting adults on more than 100 separate days. Indeed, to our knowledge those transmissions continue even today. We therefore reject this argument.[41]

41. Intercambio also argues that it did not knowingly violate the statute. They argue that they did not intend to transmit messages interstate or to transmit messages to children. As stated previously, the term "knowingly," for purposes of enforcement actions brought under Section 223(b)(4), does not require that a person have a specific intent to violate the statute. Rather, the "knowingly" standard only requires that a person either had reason to know or should have known that it engaged in acts which could constitute a violation of the statute. In the present case, Intercambio admits that it knew its message services were being accessed interstate.[42] With respect to its knowledge of whether children had listened to, or could listen to, their messages, we believe Intercambio should have known that children had ready access to their services. We do not believe that defendants' announcement at the beginning of its messages that children should hang up in any way alters this conclusion. While it may reflect some interest on the part of Intercambio to target its messages to adults, as previously stated, we continue to believe that this kind of announcement nevertheless is an utterly ineffective method to prevent children's access or ability to listen to adult messages. As noted, the Commission explicitly rejected such announcements as a defense to prosecution because of their ineffectiveness. As such, these measures offer Intercambio no protection from enforcement of the statute against it. Furthermore, we are not convinced that limiting publication of ads for those services to adult-oriented printed materials will restrict, or can be reasonably expected to restrict, children's access to these services by preventing children from becoming aware of Intercambio's services. We can take official notice of the fact that children may obtain adult newspapers and magazines in a variety of ways. The fact that children obtain copies of adult-oriented publications is well known. As previously stated, it is likewise well-known that once one child gets such a number that it is quickly passed to his peers and schoolmates. If, however, Intercambio continues to attempt to rely on this defense, it should submit specific proof with respect to the publications in which it advertises and how those publications are disseminated, as well as an explanation as to why a reasonable person would believe that as a result of such measures, children would be precluded from having access to its message services.

42. Intercambio also asserts that it did not make the prohibited communications for commercial purposes. It states that it does not receive any revenues from interstate calls because Pacific Bell is unable to bill a caller that does not originate a call to its 976 service within Pacific Bell's service territory. We believe that this argument is misplaced. As stated previously, the term "for commercial purposes" encompasses a person who runs a business enterprise for the purpose of transmitting messages which the general public may access or in order to obtain revenues whether or not that person collects any monies or makes a profit on each call made to its service. Most persons calling the Intercambio numbers incur a service charge of2.00 per call, of which1.35 is remitted by Pacific Bell to Intercambio. It is irrelevant to our purposes here that defendant receives no compensation for some calls placed to its services and may not, as a general matter, receive compensation for interstate calls to its adult message services. We note that this situation arose not from defendant's lack of interest in being compensated for such interstate calls, but because of the fact that Pacific Bell does not have billing arrangements with interexchange carriers for interstate 976 calls that would allow the 976 message charge to be passed on to the originating caller. As a result, Pacific Bell cannot collect the 976 charge that is normally shared with the message provider.[43] It would be inconsistent with the statutory purpose and the express intent of Congress to interpret the "commercial purposes" language in the strained and narrow manner advocated by Intercambio.[44] The fact that it is in the business of transmitting adult messages for profit--a business which it promotes by placing advertisements--allows the Commission to conclude that Intercambio transmitted its messages for commercial purposes for the purposes of enforcing Section 223.

43. Intercambio asserts that the legislative history shows that Section 223(b) was not intended to replace parental guidance as a means of preventing children from listening to dial-a-porn messages and that message providers cannot be expected to anticipate and protect against any failure on the part of parents to prevent their children from reaching adult services. We disagree. Under the terms of the statute itself, preventing access of children to obscene material is the Commission's primary concern. Indeed, this is consistent with the legislative history which makes clear that Congress regulated in this area because of the ready availability of dial-a- porn services to children and the fact that parents are generally unable to effectively control children's access to sexually explicit telephone messages.[45] What is more, by providing a defense to prosecution for those message providers who implement an FCC-approved method of limiting access to their messages, the statute clearly places a responsibility on the message provider to restrict access by children.

44. Intercambio also argues that the notice of apparent liability procedure is inappropriate in this case. It claims, at a minimum, that the use by the Commission of its summary forfeiture proceedings is constitutionally suspect and cites *Illinois Citizen's Committee for Broadcasting v. F. C. C.*, 515 F.2d 397 (1975), to support its argument that a hearing is necessary prior to this enforcement proceeding. We disagree. The court held that members of the public had no standing to challenge procedures when the defendant does not object to them. In that case, the court did question whether the Commission had provided adequate notice of its impending action but did not rule specifically on that point. The *Illinois Citizen's* court did note, however, that the defendant in the underlying case had the opportunity under Section 504(a) of the Act to seek judicial review by refusing to pay the forfeiture, which would require the Commission, through the appropriate U.S. attorney, to file an action in district court to recover the forfeiture by a trial *de novo*.

45. In the case before us, however, Intercambio had additional notice of the Commission's enforcement intentions by receipt of the Common Carrier Bureau Chief's December 7, 1987, letter of inquiry. Yet, Intercambio continued after that date to freely transmit the material in question. Section 223(b) does not require that a trial-type hearing be used to prosecute violations. It only requires that the Commission use "appropriate administrative proceedings." 47 U.S.C. § 223(c)(4)(B)(ii). The *Illinois Citizens* court found no prejudice from the Commission's procedure, a procedure similar to what we follow today.[46] This Commission has taken adequate steps to protect the procedural rights of Intercambio.

46. Federal agencies have wide discretion to fashion procedures that are appropriate to completing their mission. The Supreme Court has recognized that "[the] ultimate choice of procedures (in the absence of a statutory mandate) is left to the discretion of the agency involved . . . ."[47] Moreover, Congress has provided this Commission with flexibility to determine the necessary procedural requirements "as will best conduce to the proper dispatch of business and to the ends of justice," 47 U.S.C. § 154(j), as long as such procedures are consistent with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-59. The APA by itself " *never* requires a trial-type hearing. Applicability of [5 U.S.C.] §§ 554, 556, and 557 is always dependent on § 554(a): 'This section applies . . . in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing . . .' Unless another statute requires a determination on the record, §§ 554, 556, and 557 do not apply."[48] Section 223(b) does not require a determination "on the record" and therefore a trial-type hearing is not required.[49]

C. *Obscenity*

47. The only remaining element under Section 223(b) that we must consider in determining whether there has been a violation of Section 223(b) is whether the messages transmitted by Intercambio are obscene. We conclude that the messages transmitted by Intercambio that we recorded during our investigation are obscene within the meaning of Section 223(b) and prevailing Supreme Court precedent. We have made numerous recordings over a period of time of Intercambio's messages. We also note that while we do not have a recording of the exact messages transmitted by it from July 25 to September 8, 1987 (the period during which the complainant alleges her child accessed Intercambio's messages), Intercambio has not alleged that its messages varied in degree or in kind at any time from that period through and including March 9, 1988, when we recorded their messages.[50]

48. Under *Miller v. California*, 413 U.S. 15 (1973), a work is obscene if

> (a) an average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (b) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable law;[51] and (c) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

413 U.S. at 24. Two of the three criteria for obscenity--whether a work appeals to the prurient interest and whether it is patently offensive--are to be judged according to contemporary community standards. *E. g., Smith v. United States*, 431 U.S. 291, 300-01 (1977). The third criterion--whether the work lacks serious value--is to be judged according to a reasonable person test. *Pope v. Illinois*, 107 S. Ct. 1918 (1987).

49. Before applying the first two criteria to the messages at issue here, we must address the meaning of the phrase "contemporary community standards," as interpreted by the Supreme Court. In *Miller*, the Supreme Court stated that its primary purpose in referring to contemporary community standards was to permit triers of fact to exercise their traditional function of making judgments based on their knowledge of the views of the average person in the community. *Miller v. California*, 413 U.S. at 30. In *Hamling v. United States*, 418 U.S. 87, 104-05 (1974), the Court also noted that, by referring to contemporary community standards in *Miller*, it did not intend to require, as a constitutional matter, the use of any precise geographic area in evaluating whether material satisfied the obscenity criteria. Rather, the Court stated that "a principal concern in requiring that a judgment be made on the basis of 'contemporary community standards' is to assure that the material is judged neither on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group."[52]

50. We note that, in the explication of the obscenity standard in the context of, for example, the enforcement of 18 U.S.C. § 1461 (prohibiting the mailing of obscene material), lower courts have focused on the local nature of the contemporary community standards criterion and the value of local determinations in the application of that criterion.[53] The focus on local community standards, however, has developed in the context of a judicial system capable of using local decisionmakers--either juries or judges--in criminal prosecutions against purveyors of obscenity. These cases may be inapplicable in the context of an administrative action by a national agency.[54]

51. As a result, we conclude that, as a constitutional matter, this agency may apply a broader contemporary community standard generally in the determination of whether messages made available on the interstate telephone network are obscene within the meaning of Section 223(b). Furthermore, we conclude that, as a policy matter, we will not attempt to approximate a local community standard in a Section 223(b) enforcement proceeding such as this, in which we have issued a notice of

apparent liability without conducting a full hearing on the record.[55] We believe this conclusion is warranted for two reasons.

52. We note initially that, in enacting Section 223(b), Congress indicated that it did not intend that the Commission be restricted to applying a local community standard in the enforcement of the provision:

> The Commission would not be obligated to admit evidence of community standards but it certainly could do so if such evidence is appropriate or necessary. The Commission should exercise care that it does not misrepresent Supreme Court cases by inserting local before community standards. The question of whether the Commission can or should make obscenity or indency decisions is closed by the amendment.[56]

53. Further, it is important to note that, unlike *Miller* and most other obscenity cases, this proceeding is not a criminal prosecution. Although subsection (b)(1) of Section 223 authorizes the imposition of criminal sanctions, we are here proceeding administratively under our authority pursuant to Section 223(b)(4) of the Communications Act.[57] For the reasons stated above, we do not believe that, in the context of a Commission forfeiture proceeding involving Section 223(b), the application of a local community standard is necessary. Nor do we believe, in this context, that Commission application of a local standard is appropriate. Our ability to apply a standard based on a community outside of Washington, D.C., would appear to be somewhat limited. On the other hand, under Section 504(b)(6) of the Act, defendants can still avail themselves of a trial *de novo* in a local district court with respect to the enforcement of any forfeiture that may ultimately be assessed against them.[58] To the extent that a court might determine that a local standard would apply in this context, therefore, we believe that the Communications Act provides ample safeguards. Accordingly, we will not attempt to apply our own determination of a local community standard in the context of this case.

54. Applying the three criteria of the *Miller* definition, we believe that the messages at issue in this proceeding are indeed obscene.[59] First, we determine that, taken as a whole,[60] the messages appeal to the prurient interest of the average person.[61] Second, we find that, taken as a whole, they depict or describe, in a patently offensive way, the "hard core" sexual conduct specified by the Supreme Court in the *Miller* case.[62] Most, if not all, of the messages recorded during the Commission's investigation explicitly describe ultimate sexual acts of sodomy, fellatio, and masturbation in a patently offensive manner. These descriptions include vulgar and lewd characterizations of sexual acts or organs, including "pecker," "dick," "come," "fuck," "piss," "cock," and "asshole." In one tape, a man forces his nephew to lick ejaculate off the seat of his car and then masterbates into the face of the nephew. Another describes the sodomization of a young boy by a doctor during a physical examination. These descriptions are highly vulgar and degrading and appear to us to be patently offensive and to go well beyond what an average adult person in any community would consider to be portrayals of sexual conduct worthy of protection. Third, we find that no reasonable person would conclude that the messages have any serious literary, artistic, political or scientific value. Accordingly, they appear, in our view, to be obscene within the meaning of the *Miller* definition. Thus, we conclude that, by providing these sorts of messages via telephone to persons under 18, which we have tentatively found to be consistently and repeatedly obscene, Intercambio has apparently violated Section 223(b) of the Act.

55. In addition to concluding that Section 223(b) prohibits the transmission to persons under 18 communications that are obscene within the parameters established by the *Miller* definition, we also believe that the word "obscene" in Section 223(b) can be fairly interpreted to include messages that are "harmful to minors"– *i. e.*, obscene as to minors–consistent with the Supreme Court's holding in *Ginsberg v. New York*, 390 U.S. 629 (1968).[63] The principal goal of Section 223(b) is the protection of children.[64] On its face, the statute prohibits the dissemination of certain communications to children.[65]

56. Furthermore, the legislative history of Section 223(b) indicates that Congress intended the provision, consistent with Supreme Court precedent, to protect children from exposure to sexually explicit communications on the interstate telephone network.[66] The Court has specifically recognized that material can be harmful or obscene as to minors, even though it might not be obscene as to adults.[67] In *Ginsberg*, therefore, it upheld the constitutionality of a state statute that prohibited the sale to minors of publications that were defined as harmful to minors, even though those publications were not obscene with respect to adults.

57. The Court in *Ginsberg* found that the state had a preeminent and legitmate interest in protecting minors from being exposed to sexually explicit materials that were harmful to minors.[68] Fashioning the then-prevailing definition of obscenity to one appropriate for minors, the Court upheld the state statute, which defined "harmful to minors" as follows:

> [T]hat quality of any description or representation, in whatever form, or nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it:
>
> (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and
>
> (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and
>
> (iii) is utterly without redeeming social importance for minors.[69] The Court thus held that the Constitution permits the application of a variable definition of obscenity in the evaluation of government regulations that attempt to shield children from material that is harmful to them.

58. Congress, therefore, can constitutionally prevent children from gaining access to interstate telephone communications that are harmful to them. Accordingly, we believe that Congress intended this precise result and thereby intended that Section 223(b) reach communications that are "harmful to minors" when it prohibited the transmission of "obscene" communications to persons under 18 years of age.

59. Our interpretation of Section 223(b) is consistent with the *Carlin III* decision, which explicitly cited *Ginsberg* in acknowledging that Section 223(b) was designed to achieve the government's compelling interest in protecting children from certain sexually explicit messages. *Car-*

lin III, slip op. at 20. Furthermore, the court cited, with approval, recent decisions of courts of appeals that have upheld statutes attempting to restrict the display to minors of materials that are harmful to them. *Carlin III*, slip op. at 23, citing *Upper Midwest Booksellers v. Minneapolis*, 780 F.2d 1389 (8th Cir. 1985) (applying a variable definition of obscenity); *M. S. News Co. v. Casado*, 721 F.2d 1281 (10th Cir. 1983) (same). We therefore believe that our interpretation that Section 223(b) reaches material that is "harmful to minors," within the meaning of the *Ginsberg* case, is consistent with both congressional intent and the court's decision in *Carlin III*.

60. Applying this interpretation to the facts before us, we conclude that the material in our tape recordings appears harmful to minors. We note initially that the category of communications that are harmful to minors includes within it communications that are obscene, so that any obscene communication is necessarily harmful to minors.[70] Having concluded that the messages here are obscene as to adults, it therefore follows of necessity that they are also harmful to minors. Nevertheless, we can reach this conclusion by applying the traditional criteria to these communications as well. First, we believe that the messages, taken as a whole, appeal to the prurient interest of minors. Second, having already determined that the messages portray sexual conduct in a patently offensive manner as measured by contemporary community standards--and for the reasons outlined in that discussion--we have no difficulty concluding that the messages also portray such conduct in a manner that is patently offensive to prevailing standards in the contemporary adult community as a whole with respect to what is suitable material for minors. Finally, we find that no reasonable person could discern from the messages any serious literary, artistic, political or scientific value for minors. Accordingly, we find that the messages appear harmful or obscene as to minors within the meaning of the *Ginsberg* case, independently from our conclusion that they appear obscene as to adults within the meaning of the *Miller* case.

61. Finally, we conclude that the messages at issue here are "indecent" as we interpret the statute's use of that term. Although the Second Circuit in *Carlin III* construed Congress' use of the word "indecent" in Section 223(b) to reach only obscene communications, we disagree with that construction and believe that the legislative history to the statute makes clear that Congress intended the term "indecent" to have a meaning distinct from the term "obscene." 129 Cong. Rec 10559 (daily ed. Nov. 18, 1983) (statement of Rep. Bliley). More specifically, we believe that the legislative history reveals that Congress intended the term "indecent" to be defined as that term was defined in an analogous context in 18 U.S.C. § 1464.[71] Accordingly, we believe that Section 223(b)'s use of the term "indecent" applies to communications that fall within the following definition:

> language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.

See id. See also Pacifica Foundation, Inc., 2 FCC Rcd 2698 (1987); *Infinity Broadcasting Corp.*, 2 FCC Rcd 2705 (1987); *Regents of the University of California*, 2 FCC Rcd 2703 (1987); order on reconsideration, *Infinity Broadcasting Corp.*, 3 FCC Rcd 930 (1987). Nevertheless, in recognition of the Second Circuit's ruling on this issue, we simply make the following determination with respect to these messages as a separate and alternative finding for whatever relevance it may have in any future proceedings. As noted above, our independent conclusions that these messages are obscene and harmful to minors are sufficient to sustain our action herein.

62. The messages at issue in this proceeding are indecent within the meaning of Section 223(b). As with messages that are harmful to minors, the category of communications that are indecent includes within it communications that are obscene, so that any obscene communication is necessarily indecent.[72] Having concluded that the messages here are obscene, it therefore follows that they are also indecent. The crucial distinction between indecent and obscene communications (including those communications that are harmful to minors) is that indecent communications need not appeal to the prurient interest, nor will the presence of serious literary, artistic, political or scientific value automatically preclude them from finding of indecency. *See Infinity Broadcasting Corp.*, 3 FCC Rcd at 932, ¶ 17 (merit is simply one of many variables that make up a work's context). As discussed above, we have already determined that these messages, in context, depict and describe, in terms patently offensive as measured by contemporary community standards, sexual and excretory activities and organs. Hence, we reach independent conclusions that the messages at issue in this proceeding are indecent, harmful to minors and obscene within the meaning of Section 223(b).

III. APPLICATION OF STATUTE TO INDIVIDUALS

63. Although this Notice of Apparent Liability proposes fines against the corporation and not against any specific individuals, we believe that additional information concerning the involvement of specific individuals in the corporate activities which are the subject of this proceeding is necessary. This information will enable us to determine whether there are any company officials or other persons--such as those who have permitted telephone facilities under their control to be used to violate subsection (b)(1)(A)--who may have liability under the statute.[73] We therefore require that the corporation provide answers to the following questions within 30 days of the release of this Notice:

> 1. The corporation shall provide the following information for each director and/or officer of the corporation and for all other persons or agents who perform managerial functions or who act on behalf of the corporation, or are empowered to act on behalf of the corporation, or who have ny other legal or equitable interest in the corporation:
>
> a. full name;
>
> b. address;
>
> c. business telephone number;
>
> d. address of principal office;

e. description of duties and services performed by each such individual for the corporation since October 19, 1987; if those duties or services have changed, specify each time period during which that individual performed those duties and services;

f. dates of service with the corporation;

g. description of the nature and the degree of the individual's involvement in and responsibility for (i) deciding to provide message services from lines (213) 976-7744 and (213) 976-7825 and (ii) reviewing and/or creating individual tapes provided over those lines; and

h. description of the nature and degree of the individual's involvement in and responsibility for selecting or not selecting (i) a method of restricting access to the message service by children and (ii) a method of restricting access consistent with Section 64.201 of the Commission's rules

2. The corporation shall produce the following documents:

a. all public record documents relating to the establishment and registration of the corporation in the state of its corporation;

b. all documents which describe the duties and responsibiities of any officer or director of the corporation;

c. all documents which refer to a decision to start or continue to provide message services over lines (213) 976-7744 and (213) 976-7825;

d. all documents which refer to a decision to restrict or not restrict access to message services provided over lines (213) 976-7744 and (213) 976-7825; and

e. all documents which refer to the nature of the content of the messages provided over lines (213) 976-7744 and (213) 976-7825

3. In addition to the documents requested in No. 2 above, the corporation shall produce any and all other documents in its possession relating to the activities of the corporation in connection with the corporation's provision of sexually explicit messages over the telephone network.

IV. COMPUTATION OF THE FINE

64. We here propose a fine on Intercambio totalling 600,000. Based on the repeated occasions on which obscene messages were apparently transmitted in violation of the statute, and our authority to impose a50,000 fine for each day of violation, the amount of the fine could be much higher. Nevertheless, the amount of the fine we are here proposing is based on our assessment of the totality of the circumstances and a variety of factors which have been weighed in order to determine what a reasonable fine is in this case. In making this assessment, we considered, among other things, factors such as the number of days the violation occurred, the steps taken in response to the Bureau's inquiry, and any history of any prior Commission offenses. Weighing these factors, we believe a fine of600,000 is reasonable on the facts of this case.

V. CONCLUSION

65. In our evaluation of possible violations of Section 223(b), we have relied on both the allegations in the complaint and the FOB tape recordings of Intercambio's messages. The complaint suggests that some children have accessed its messages, and that no restrictions on access were in place when those calls to its numbers were made. The FOB has made over 100 calls to Intercambio's numbers since October 19, 1987, and also found no restrictions in place during any of its calls. From these facts, we can reasonably conclude that, during the period we monitored, children could have easily accessed, and in fact did access, Intercambio's tape recorded messages without any restrictions on a continuing basis. Furthermore, because we found the numerous messages provided by Intercambio over its 976 lines that we taped during the course of our investigation to be, as outlined above, consistently obscene, we can reasonably conclude that the messages that were accessed by minors during the period of investigation in which no effective method of restricting access was utilized were obscene as well. As noted earlier, Intercambio has not alleged that its messages have varied in manner, degree or kind during either the period covered by the complaint or our investigation. In conclusion, we find we have a reasonable basis to conclude that Intercambio violated Section 223(b) on the days its messages were recorded by this Commission.

VI. ORDERING CLAUSES

66. Accordingly, IT IS ORDERED, pursuant to Section 223(b) of the Communications Act, 47 U.S.C. § 223(b), that Intercambio, Inc., is apparently liable for a forfeiture of600,000 for knowingly making, by recording device, interstate obscene communication for commercial purposes to persons under eighteen years of age, in violation of Section 223(b) of the Act, 47 U.S.C. § 223(b).

67. IT IS FURTHER ORDERED that Intercambio shall within thirty days of the release date of this notice pay the full amount of its fine or file a response showing why the forfeiture should not be imposed or the reason why the proposed forfeiture should be reduced.[74] If the fine is not paid, the response should include supporting evidence sufficient to rebut the tentative conclusions outlined in this notice.

68. IT IS FURTHER ORDERED that Intercambio shall, within 30 days of release of this Notice of Apparent Liability, respond to the questions set forth in Section III.

69. IT IS FURTHER ORDERED that Intercambio, Inc., shall, within 30 days of release of this Notice of Apparent Liability, produce tapes or transcripts of the messages provided by it over (213) 976-7744 and (213) 976-7825, on the dates and times that the complainant alleges her child accessed Intercambio's messages at those numbers.

70. IT IS FURTHER ORDERED that a copy of this Notice shall be sent by certified mail, return receipt requested, to Intercambio including a copy of the tape the staff has made of its messages.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

APPENDIX A

ENF-88-03

Telephone Number (213) 976-7744

Date	Time	Date	Time
10/19/87	3:48 p.m.	1/14/88	4:34 p.m.
10/22/87	1:35 p.m.	1/15/88	3:46 p.m.
10/23/87	1:58 p.m.	1/19/88	4:11 p.m.
10/26/87	10:22 a.m.	1/20/88	4:49 p.m.
11/11/87	3:30 p.m.	1/21/88	4:05 p.m.
11/20/87	3:26 p.m.	1/22/88	3:35 p.m.
11/21/87	10:02 a.m.	1/25/88	2:50 p.m.
11/22/87	3:30 p.m.	1/26/88	4:48 p.m.
11/23/87	2:54 p.m.	1/28/88	4:46 p.m.
11/24/87	3:41 p.m.	1/29/88	3:50 p.m.
12/1/87	4:13 p.m.	2/1/88	3:57 p.m.
12/3/87	4:24 p.m.	2/2/88	4:21 p.m.
12/7/87	5:11 p.m.	2/3/88	4:22 p.m.
12/8/87	3:34 p.m.	2/4/88	4:11 p.m.
12/9/87	3:50 p.m.	2/5/88	5:19 p.m.
	4:17 p.m.	2/8/88	3:46 p.m.
12/10/87	4:23 p.m.	2/9/88	4:44 p.m.
12/11/87	4:10 p.m.	2/12/88	4:29 p.m.
12/14/87	3:47 p.m.	2/16/88	4:16 p.m.
12/15/87	4:06 p.m.	2/17/88	4:26 p.m.
12/16/87	3:46 p.m.	2/18/88	4:51 p.m.
	3:53 p.m.	2/19/88	4:58 p.m.
12/17/87	4:09 p.m.	2/22/88	3:33 p.m.
12/21/87	3:56 p.m.	2/23/88	4:09 p.m.
12/22/87	4:46 p.m.	2/24/88	4:01 p.m.
12/23/87	4:26 p.m.	2/25/88	4:13 p.m.
12/24/87	3:34 p.m.	2/26/88	4:05 p.m.
12/28/87	3:52 p.m.	2/29/88	4:01 p.m.
12/29/87	4:07 p.m.	3/1/88	4:19 p.m.
12/30/87	4:49 p.m.		4:23 p.m.
12/31/87	3:53 p.m.	3/2/88	4:09 p.m.
1/4/88	4:17 p.m.		4:15 p.m.
1/5/88	4:40 p.m.	3/3/88	4:12 p.m.
1/6/88	4:46 p.m.	3/4/88	3:36 p.m.
1/7/88	4:20 p.m.	3/7/88	4:03 p.m.
1/11/88	4:35 p.m.	3/8/88	4:39 p.m.
1/12/88	5:10 p.m.	3/9/88	2:32 p.m.
1/13/88	4:40 p.m.		

Telephone Number (213) 976-7825

Date	Time	Date	Time
10/19/87	3:37 p.m.	1/20/88	4:51 p.m.
10/22/87	1:33 p.m.	1/21/88	4:08 p.m.
10/23/87	1:55 p.m.	1/22/88	3:39 p.m.
10/26/87	10:20 a.m.	1/25/88	2:54 p.m.
12/1/87	4:17 p.m.	1/26/88	4:50 p.m.
12/3/87	4:27 p.m.	1/27/88	4:27 p.m.
12/4/87	4:38 p.m.	1/28/88	4:50 p.m.
12/7/87	5:15 p.m.	1/29/88	3:53 p.m.
12/8/87	3:39 p.m.	2/1/88	4:00 p.m.
12/9/87	4:25 p.m.	2/2/88	4:25 p.m.
12/10/87	4:30 p.m.	2/4/88	4:19 p.m.
12/11/87	4:15 p.m.	2/5/88	5:21 p.m.
12/15/87	4:17 p.m.	2/8/88	3:51 p.m.
12/16/87	4:01 p.m.	2/9/88	4:48 p.m.
12/17/87	4:14 p.m.	2/12/88	4:32 p.m.
12/21/87	4:01 p.m.	2/16/88	4:19 p.m.
12/22/87	4:50 p.m.	2/17/88	4:29 p.m.
12/23/87	4:30 p.m.	2/18/88	4:57 p.m.
12/24/87	3:42 p.m.	2/19/88	5:00 p.m.
12/28/87	3:58 p.m.	2/22/88	3:36 p.m.
12/30/87	3:55 p.m.	2/23/88	4:12 p.m.
12/31/87	3:58 p.m.	2/24/88	4:04 p.m.
1/4/88	4:22 p.m.	2/25/88	4:16 p.m.
1/5/88	4:43 p.m.	2/26/88	4:17 p.m
1/6/88	4:50 p.m.	2/29/88	4:05 p.m.
1/7/88	4:24 p.m.	3/1/88	4:28 p.m.
1/11/88	4:38 p.m.	3/2/88	4:18 p.m.
1/12/88	5:13 p.m.	3/3/88	4:16 p.m.
1/13/88	4:44 p.m.	3/4/88	3:39 p.m.
1/14/88	4:39 p.m.	3/7/88	4:07 p.m.
1/15/88	3:50 p.m.	3/8/88	4:42 p.m.
1/19/88	4:14 p.m.	3/9/88	2:36 p.m.

FOOTNOTES

[1] Section 223(b) states in pertinent part, that parties who knowingly and for commercial purposes, by means of telephone, transmit, or who allow telephones or telephone facilities under their control to be used to transmit, obscene communications to persons under 18 years of age or nonconsenting adults will be subject to certain penalties. *See infra* para. 5.

[2] Section 223(b)(4) authorizes the Commission to impose certain fines for violations of Section 223(b) "after appropriate administrative proceedings." To assure the due process rights of Intercambio, we will use as a guideline the procedures for forfeiture found in Section 1.80 of our rules, 47 C.F.R. § 1.80. However, the fine imposed herein is being imposed pursuant to Section 223(b) and not pursuant to Section 1.80.

[3] Section 64.201 contains the Commission-approved methods for restricting access to dial-a-porn messages by minors and nonconsenting adults. *See infra*, para. 12.

[4] 129 Cong. Rec. H10,560 (daily ed. Nov. 18, 1983) (statement of Rep. Bliley).

[5] 129 Cong. Rec. S16,866 (daily ed. Nov. 18, 1983) (statement of Sen. Trible).

[6] On April 27, 1988, the President signed into law an amendment to Section 223(b) which bans all obscene or indecent communications in interstate communications or within the District of Columbia. This amendment is effective July 1, 1988. This amendment does not affect this proceeding because the proposed fine is levied for Intercambio's past violations of the law in effect at the time of the violations. We note that because we have concluded that the vast majority of Intercambio's message were apparently obscene, if the new statute had been in effect when the violations occured, Intercambio would have been in violation of the new statute.

[7] Inquiry into Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials (Dial-a-Porn Enforcement), FCC 84-253, 49 Fed. Reg. 24,996 (released June 19, 1984) (First Report and Order).

[8] Carlin Communications v. FCC, 749 F.2d 113 (2d Cir. 1984) (Carlin I).

[9] Because in the court's opinion the Commission's rules were content-based, it applied a stricter level of scrutiny than would be required for content-neutral regulations. Under this standard, the court required the rule to be the least burdensome alternative necessary to achieve a compelling governmental interest.

[10] Dial-a-Porn Enforcement, FCC 85-97, 50 Fed. Reg. 10,510 (released Mar. 8, 1985) (Second Notice of Proposed Rule Making).

[11] Dial-a-Porn Enforcement, FCC 85-554, 50 Fed. Reg. 42,699 (released Oct. 22, 1985) (Second Report and Order).

[12] Carlin Communications v. FCC, 787 F.2d 846 (2d Cir. 1986) (Carlin II).

[13] Dial-a-Porn Enforcement, 2 FCC Rcd 2714 (1987) (Third Report and Order).

[14] Carlin Communications v. FCC, 837 F.2d 546 (2d Cir. 1988) (Carlin III).

[15] A request for rehearing filed by Carlin Communications was denied by the Second Circuit on April 4, 1988. Thereafter, Carlin petitioned the court to stay the issuance of its mandate. The court granted a temporary stay of the issuance of its mandate on April 13, 1988. Subsequently, the court issued the mandate on May 6, 1988.

[16] The *Second Report and Order* provided for the use of credit cards and previously assigned access codes but did not include the scrambling option. We note, however, that had Intercambio attempted to restrict children's access by scrambling its messages, we would have exercised our discretion not to take enforcement action. That was not the case, however. Instead, we have a situation where a message provider was taking none of the steps that we have indicated are sufficient to restrict children's access to dial-a-porn services.

[17] *See* Appendix A for a precise record of the dates and times of the FOB's calls.

[18] Nor were the messages scrambled. As stated earlier, although the scrambling option was not technically in effect at that time, the Commission would have declined to take enforcement action against a message provider employing scrambling to limit children's access. The Commission's concern is with dial-a-porn services available indiscriminately to any caller, with no effective measures taken to restrict children's access. Intercambio has not suggested any willingness to scramble its messages.

[19] In the period of 27 months that defendants operated the number (213) 976-7825, Pacific Bell's records show that Intercambio received 142,796 calls, generating revenue for Intercambio of192,774.60. Pacific Bell's records also show that Intercambio received105,614.55 as a result of 78,233 calls to their second line, (213) 976-7744, during the 29 months of operation.

[20] Although we recognize that our interpretation is not the only possible construction and application of the statute, we find that our approach reasonably resolves statutory issues, some of which Congress did not directly address, but which must be resolved in order for us to enforce the statute. Moreover, we believe our construction furthers the statutory purpose without contravening any express statutory language or statements of congressional intent. As such, this approach is a permissible one entitled to deference by reviewing courts. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843-46 (1984). *See also* NLRB v. United Food and Commercial Workers Union, 108 S. Ct. 413 (1987).

[21] The fact that the transmission was by recording device rather than by a live person whose message was being transmitted is irrelevant for purposes of falling under Section 223(b). Congress amended Section 223(b) precisely to cover the type of recorded message services involved in this case.

[22] *See also infra* note 31. Notwithstanding that failure to restrict access in accordance with 47 C.F.R. § 64.201 is not itself a violation of Section 223(b)(1), a message provider who ignores our rules does so at the risk of being found in violation of Section 223(b) if children are able to readily access that dial-a-porn service.

[23] Section 223(b)(4)(A) allows the Commission to assess civil fines of up to50,000 for each violation, and further provides that "each day of violation shall constitute a separate violation" for these purposes.

[24] As a general matter, the messages provided by adult message services are changed frequently. In this case, for example, our monitoring revealed that the defendant's messages were changed on a daily basis.

[25] Moreover, Congress could not have intended that we enforce the statute by relying solely on calls made by specific minors to adult message services which this agency had encouraged or facilitated in order to generate evidence. It would be anomalous indeed if an agency entrusted with the enforcement of a statute aimed at protecting minors from salacious telephone messages could fulfill that responsibility only by intentionally exposing children to those messages. Of course, should evidence become available that a child has accessed a particular message that we have tape-recorded, we would also be able to enforce the statute on the actual evidence that a child has accessed a particular recording either in this proceeding or in another.

[26] *See, e.g.* 129 Cong. Rec. E5966 (daily ed. Dec. 14, 1983) (statement of Rep. Kastenmeier) ("In Butler, the Supreme Court struck down as unconstitutional a statute that had the effect of preventing adults from having access to materials judged to have a potentially deleterious influence on children. The Court explained that the statute would have reduced the adult population to reading only what was fit for a child. The principle is equally applicable here, and so we have carefully constructed section 223, as amended, to avoid reducing the adult population to hearing only what is fit for a child. We leave it to the FCC to prescribe the specific regulations that *permit adult access while limiting children's access.* " (emphasis added)).

[27] *See* 129 Cong. Rec. H10560 (daily ed. Nov. 18, 1983) (statement of Rep. Bliley) ("Dial-it services are subject to the nuisance rational [sic] in Pacifica or under common law because of their indiscriminate availability to children. . . . [O]perators of attractive nuisances such as dial-a-porn must place a barrier between the offensive material and children. . . . *The availability of obscene material to children is the controlling factor in this amendment.* . . . The fact that children can call the number with no limitation is sufficient to impose the lesser standard. . . . The inability of parents to effectively control children's access to obscene material places a duty on the Government to intervene." (emphasis added)).

[28] Because the direct evidence on which we base our finding of apparent violations is limited to those days covered by our own investigation, the initial complaint, given its allegations that a minor had accessed sexually explicit messages, serves as a trigger for our investigation, rather than as a direct basis for our findings of apparent violation. In cases where a subsequent complaint alleges access by a minor on dates for which we have monitored the provider's operations and messages, the allegations contained in that later complaint provide additional pro-

bative evidence upon which to conclude that minors have in fact accessed the provider's obscene messages in violation of the law during the monitoring period.

[29] Were we to interpret the term "knowingly" otherwise and allow a message provider's assertion that he never specifically intended to transmit his messages to a minor or minors to serve as a defense to prosecution under the statute in cases where those messages were in fact readily accessible to minors, the entire statutory purpose would be defeated. Message providers could readily avoid enforcement of the statute against them, and they would have no incentive to comply with the Commission's dial-a- porn regulation or take any other steps to restrict access to minors as Congress intended. A message provider offering a tape recording to all callers indiscriminately will never know whether an individual caller is a minor or adult. Accordingly, we reject an interpretation of "knowingly" that requires the message provider to intend that its messages be transmitted to minors as unreasonable under the statutory scheme, because it would allow noncompliance without risk of prosecution by all dial-a-porn providers, in direct contravention of Congressional intent.

[30] *See* Ginsberg v. New York, 390 U.S. 629, 643-44 (1968); United States v. Smith, 467 F.2d 1126 (7th Cir. 1972).

[31] This case does not present a situation in which, although a message provider has not complied with one of our approved methods, access to its sexually explicit messages has nevertheless been effectively restricted in some other way, either by virtue of alternative actions taken by the message provider, or interstate blocking schemes that may restrict interstate access by minors. As discussed more fully below, the evidence in this case suggests that the message provider has been transmitting its sexually explicit telephone messages to all callers, including minors, without using one of our approved methods or any other reasonably effective measure to restrict access to minors. As a result, we conclude that defendant has no basis to claim that no "knowing" violations have occurred.

[32] Intercambio contends that the Commission intended credit card payment to be used with live services and that, since the Commission itself stated that credit card payment would be economically infeasible for recorded message services, the method does not apply here. Although the credit card option has been most often discussed in the context of live services, there is nothing in the rule which would prevent prepayment by credit card as a legitimate method for restricting access to recorded message services. We are aware that equipment exists on the market today which can automatically recognize a valid credit card number prior to a person permitting access to its prerecorded message service.

[33] Pacific Bell has offered interactive capability over its 976 lines since the original effective date of its 976 IAS tarriff, September 23, 1985, thus allowing a caller to send information to or receive it from the message provider's IAS equipment. *See* Cal. P.U.C. Tariff No. A9.5.2(B)(3) (Sept. 23, 1985). Indeed, we know that there are information service providers offering their services over Pacific Bell's 976 service that use an interactive access code system to verify whether callers to their numbers may access certain information. *See* Comments of Pacific Bell, Attachment B, in Dial-a-Porn Enforcement Proceeding, Third Report and Order, *supra* note 13 (filed Sept. 8, 1986).

[34] Even there, the court's concern was focused on NYT's interactive capability and not the capability of the equipment chosen by the individual message provider to make its service available to the public.

[35] Telocator v. FCC, 691 F.2d 525, 539 n.114 (1982).

[36] *See, e.g.*, Ginsberg v. New York, 390 U.S. 629 (1968); *see also* Pacifica Foundation v. FCC, 438 U.S. 727 (1978).

[37] Roth v. United States, 354 U.S. 476, 483 (1957).

[38] Dial-a-Porn Enforcement, Second Report and Order, *supra* note 11, at n.51.

[39] *See* Dial-a-Porn Enforcement, First Report and Order, *supra* note 7, at para. 31.

[40] On April 17, 1985, the California Public Utilities Commission initiated an investigation, I. 85-04-047, into 976 services that has resulted in two decisions. The first, Decision 87-12-028, released November 6, 1985, addressed advertising disclosure and billing adjustments. The second, Decision 87-12-038, released December 9, 1987, required Pacific Bell and GTE of California to offer California customers the option to block all 976 numbers at a nominal fee.

[41] What is more, it appears that the implementation schedule for Pacific Bell's new intrastate 900 service is far from certain. Although the two year provisional tariff proposal was scheduled to become effective Mar. 23, 1988, the California Public Utility Commission has instituted an investigation of the offering. CPUC Resolution T-12069 (Mar. 23, 1988). This could result in a lengthy delay before that service takes effect.

[42] *See* Response of Intercambio, at 10-12 (filed Jan. 20, 1988).

[43] Intercambio Response at 11 (Jan. 20, 1988).

[44] *See supra* para. 32.

[45] *See supra* note 28.

[46] *See also infra* paras. 38-42 for a further discussion of the validity of the procedures we are here following.

[47] Bell Tel. Co. of Pa. v. F.C.C., 503 F.2d 1250, 1266 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975). *See also* United States v. Florida East Coast Railway Co., 410 U.S. 224, 244-46 (1973).

[48] 2 K. Davis, Administrative Law Treatise, § 12.10 at 447 (2d ed. 1979). *See also* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978) ("even apart from the APA, the formulation of procedures should be basically left within the discretion of the agencies."); ITT World Communications, Inc. v. F.C.C., 595 F.2d 897, 900-01 (2d Cir. 1979); Comark Cable Fund III, 104 FCC 2d 451, 460-61 at n.20 (1985).

[49] We are here requiring Intercambio to produce tapes and/or transcripts of the messages it transmitted on the dates and times that the minor who is the subject of the complaint is alleged to have accessed those messages. *See infra* para. 69. We also invite Intercambio to submit tapes and transcipts of its messages on any other days Intercambio believes may be relevant to its defense in this proceeding. This requirement is consistent with our normal burden-of-proof requirements which place the burden of going forward to produce evidence on the party which can be expected to have sole possession of the evidence. *See* Hughes Sports Network, Inc., 38 FCC 2d 1052 (1972).

[50] If it intends to make such claims, it should produce tapes or transcripts of the messages it offered at the date and times covered by the complaint.

[51] In the case of a federal obscenity statute, the Supreme Court has held that, unless otherwise specifically stated in the statute, the relevant conduct proscribed by the statute banning obscenity is the "hard core" activity described in the *Miller* decision. United States v. 12 200-ft Reels of Film, 413 U.S. 123, 130 n.7 (1973), citing Miller v. California, 413 U.S. at 25. *See also* Hamling v. United States, 418 U.S. 87, 110-16 (1974).

[52] *Hamling* at 107. *See also* Miller v. California, 413 U.S. at 33; Smith v. United States, 431 U.S. at 305.

[53] *Id.*, citing United States v. Various Articles of Obscene Merchandise, Seizure No. 170, 750 F.2d 596 (7th Cir. 1984); United States v. Bagnell, 679 F.2d 826 (11th Cir. 1982), *cert. denied*, 460 U.S. 1047 (1983); United States v. Thomas, 613 F.2d 787 (11th Cir.), *cert. denied*, 449 U.S. 888 (1980); United States v. McManus, 535 F.2d 460 (8th Cir. 1976), *cert. denied*, 429 U.S. 1052 (1977).

[54] Applications of Video 44 for Renewal of WSNS-TV Channel 44, 3 FCC Rcd 757, 758 (1988) (hereinafter Video 44). Indeed, in *Video 44*, we noted that, in the past, the Commission undertook an obscenity determination in a broadcast case without focusing on a particular community and was upheld by the Court of Appeals. *Id.*, citing Sonderling Broadcasting Corp., 27 Rad. Reg. 2d (P&F) 285, *recon. denied*, 41 FCC 2d 777 (1973), *aff'd sub nom.* Illinois Citizens Committee for Broadcasting v. FCC, 515 F.2d 397 (D.C. Cir. 1975).

[55] We did not reach this issue in *Video 44* ("We do not -- and need not -- decide here whether, as a policy matter, we might choose to attempt to approximate a more local community standard in an appropriate [broadcast] case presenting an obscenity issue."). 3 FCC Rcd at 758.

[56] 129 Cong. Rec. H10,560 (daily ed. Nov. 18, 1983) (remarks of Rep. Bliley).

[57] 47 U.S.C. § 223(b)(4).

[58] *See* 47 U.S.C. § 504(b)(6).

[59] In evaluating the claim of obscenity, we have not simply relied on the allegations contained in the complaint, but have also evaluated the tape recordings of the messages that the staff has made. For the reasons stated herein, we believe that all of these messages are relevant in determining whether a violation of Section 223(b) has occurred.

[60] Although the transcripts on file with the FCC provide the spoken words on the tape recordings, we have evaluated the audio presentations of the messages themselves in making our obscenity evaluation. These presentations contain verbal inflections, such as heavy breathing and screams, that exacerbate the offensive and debasing portrayals of sexual activity and that are intended to portray actual sexual activity.

[61] The Supreme Court has defined prurient as "that which appeals to a shameful or morbid interest in sex." Brocket v. Spokane Arcades, Inc., 472 U.S.491, 498 (1985); Roth v. United States, 354 U.S. 476, 487 n.20 (1957). We find that the messages, which consist entirely of detailed, repeated, explicit descriptions and simulations of a wide range of sexual activities, satisfy this definition. Indeed, the very purpose of these dial-a-porn messages is apparently to appeal to the prurient interest.

[62] The Supreme Court, in *Miller*, gave examples of "patently offensive" depictions or descriptions of sexual conduct as follows:

> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

Miller v. California, 413 U.S. at 25.

[63] *See also* Upper Midwest Booksellers v. Minneapolis, 780 F.2d 1389 (1389 (8th Cir. 1985) (applying a variable definition of obscenity); M.S. News Co. v. Casado, 721 F.2d 1281 (10th Cir. 1983) (same). *See generally* Virginia v. American Booksellers Ass'n, 56 U.S.L.W. 4113 (U.S. Jan. 25, 1988) (No. 86-1034) (certifying questions to the Virginia Supreme Court as to the scope of a state statute regulating the display of material that is "harmful to minors").

[64] 129 Cong. Rec. H10,560 (daily ed. Nov. 18, 1983) (statement of Rep. Bliley); *id.* at S16,866 (statement of Sen. Trible).

[65] Although Congress could have constitutionally banned the commercial transmission of obscene communications altogether, even to consenting adults, *Paris Adult Theatre I v. Slaton*, 413 U.S. 48 (1973), it chose to prohibit those transmissions primarily to persons under 18, thereby underscoring the overall statutory scheme of protecting children. Although the statute protects consenting adults as well, we believe that its express intention of protecting children provides an independent basis for concluding that the term "obscene" applies to material that is obscene as to minors.

[66] 129 Cong. Rec. E5966 (daily ed. Dec. 14, 1983) (remarks of Sen. Kastenmeier).

[67] Ginsberg v. New York, 390 U.S. 629 (1968).

[68] Because the statute did not ban the sale of such publications outright, but only restricted their sale to adults, the regulatory scheme did not run afoul of the constitutional principle announced in *Butler v. Michigan*, 352 U.S. 380 (1957), that, in an effort to protect the well-being of children, the state may not reduce the adult population to reading only that which is fit for children. Likewise, because the *Carlin III* court found that Section 223(b) and our regulations allow adult access to sexually explicit messages, while prohibiting access by children, we do not believe that this regulatory scheme violates the principle of *Butler*.

[69] Ginsberg v. New York, 390 U.S. at 646. At the time of *Ginsberg*, the prevailing obscenity definition was the one articulated in *A Book Named " John Cleland's Memoirs of a Woman of Pleasure " v. Commonwealth of Mass.*, 383 U.S. 413, 418-19 (1966) (quoting *Roth v. United* States, 354 U.S. 476 (1957), which required material to be "utterly without redeeming value" in order to be obscene. In Miller v. California, the Supreme Court refined the Memoirs definition to require only that the material lack "serious literary, artistic, political or scientific value." States have subsequently modified statutes regulating material that is harmful to minors to conform to a variation of the Miller definition. *See* Virginia v. American Booksellers Ass'n, 56 U.S.L.W. 4113 (U.S. Jan. 25, 1988); Upper Midwest Booksellers v. Minneapolis, 780 F.2d 1389 (8th Cir. 1985); M.S. News Co. v. Casado, 721 F.2d 1281 (10th Cir. 1983).

[70] The converse, however, is not true in that not all communications that are harmful to minors are necessarily obscene.

[71] 129 Cong. Rec. H10559 (daily ed. Nov. 19, 1983) (statement of Rep. Bliley) (citing FCC v. Pacifica Foundation, 438 U.S. 726 (1978)).

[72] The converse, however, is not true in that not all indecent communications are necessarily obscene.

[73] *See* subsection 223(b)(1)(B), 47 U.S.C. § 223(b)(1)(B).

[74] Such a forfeiture amount should be paid by check or mail order drawn to the order of the Federal Communications Commission. The check or money order should be mailed to the Fee Collection Section, Finance Branch, Federal Communications Commission, Box 19032, Washington, D.C. 20036, or delivered to the Fee Collection Section, Room 209, 1919 M Street, N.W., Washington, D.C.

SEPARATE STATEMENT
OF
COMMISSIONER PATRICIA DIAZ DENNIS

In Re: The Matter of Intercambio, Inc., Apparent Liability for Forfeiture.

I write separately to state that *Video 44*,[1] a broadcasting case, is no authority for determining in this common carrier decision that the FCC may make obscenity determinations without reference to a particular community. *See Notice* at p. 27, fn. 54. In *Video 44*, I separately stated that the Commission should not, and could not, there reach the issue of what community standard was appropriate, because it was premature to do so.

I, nevertheless, find a national standard appropriate. This proceeding is to determine "apparent liability," which is the first of several steps which could include a trial *de novo* in federal district court. *See* 47 C.F.R. 1.80(f). At such a trial, a judge and/or a jury will be available, if appropriate, to apply a local community standard.

Applying the national standard, I concur that *many* of the messages the Commission's investigators recorded are obscene for children, if not adults. I cannot agree, however, that finding these messages obscene is enough to establish liability under Section 223. In particular, I am unpersuaded that the statute, on its face or in light of legislative history, permits a finding of liability based upon "accessibility" of obscene messages by minors. The unambiguous language of the statute applies to "[w]hoever knowingly . . . makes . . . any obscene or indecent communication for commercial purposes *to* any person under eighteen years of age." 47 U.S.C. Sec. 223(b) (1) (A) (emphasis added). Reliance on legislative history is not appropriate or necessary.*See Ex Parte Collett*, 337 U.S. 55, 61, 69 S.Ct 944, 947, 93 L.Ed. 1207, 1211 (1949), and cases cited therein. Even if it were, the history cited in the Notice does not support the conclusion that mere accessibility, rather than actual access, by minors is a sufficient basis for liability. Remarks made during congressional floor debates (and extended remarks never actually heard on the floor) such as those in the Notice are not always a reliable basis for interpreting statutes. *See Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395-397; 71 S.Ct. 745, 751-752; 95 L.Ed. 1035, 1048-1049 (1951) (Jackson, J., concurring). The remarks about "accessibility" are taken out of context and, in any event, were characterized as "not dispositive" by the author of the statutory language. 129 Cong. Rec. E5966 (daily ed. Dec. 14, 1983) (Statement of Rep. Kastenmeier). The Congressional purpose was to "limit access" by children, not prevent all accessibility by children. *Id.*

Nor can I agree that language in paragraph (4) (A) of Section 223(b), providing an additional *penalty* for violation, supports the Notice's broad interpretation of paragraph 1(A), which defines the *violation*, especially when the language relied on is preceded by the phrase "[f]or purposes of this paragraph." *See* Notice, at para. 25.

However, I can concur in the result the Commission reaches because, again, this Notice determines only "apparent liability." At a trial *de novo*, after further Commission proceedings and possible discovery, the U.S. Attorney can present the evidence, if it actually exists, to establish liability. In this proceeding, we determine only that evidence is sufficient to proceed further and to place upon Intercambio the burden of presenting to the Commission exculpatory evidence uniquely in its possession.

FOOTNOTE FOR STATEMENT

[1] Applications of Video 44 for Renewal of WSNS-TV, Channel 44, 3 FCC Rcd 757 (1988)

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-575

In the Matter of

Amendment of Section 73.202(b), RM-6405
Table of Allotments,
FM Broadcast Stations.
(Englewood, Ohio)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 15, 1988; Released: December 22, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by LC Communications (petitioner), requesting the allotment of Channel 233A to Englewood, Ohio, as the community's first local FM service. Petitioner states that it will apply for the channel, if allotted.

2. Channel 233A can be allotted to Englewood in compliance with the Commission's minimum distance separation requirements with a site restriction of 3.6 kilometers (2.2 miles) north to avoid a short-spacing to Station WLAP-FM, Channel 233C1, Lexington, Kentucky, and to Station WLLT, Channel 235B, Fairfield, Ohio.[1] Canadian concurrence is required since Englewood is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. We believe the public interest would be served by proposing the allocation of Channel 233A to Englewood, Ohio, as the community's first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Englewood, Ohio	--	233A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 17, 1989,** and reply comments on or before **March 6, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Lewis Gibbs
23010 Harding Drvie
Oak Park, Michigan 48237
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 39-54-34 and West Longitude 84-17-37.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-574

In the Matter of

Amendment of Section 73.202(b), RM-6478
Table of Allotments,
FM Broadcast Stations.
(Kirksville, Missouri)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 18, 1988; Released: December 22, 1988

By the Deputy Chief, Policy and Rules Division:

1. KIRX, Inc. (petitioner) has filed a petition for rule making seeking the substitution of FM Channel 233C for Channel 233C1 at Kirksville, Missouri. Petitioner also requests modification of its license for Station KRXL(FM), Channel 233C1, to specify operation on Channel 233C.

2. A staff engineering analysis has determined that Channel 233C can be allotted to Kirksville consistent with the minimum distance spacing requirements specified in Section 73.207 of the Commission's Rules at the site specified by the petitioner. Petitioner has specified a site 14.4 kilometers (8.9 miles) northeast of the community.[1]

3. In view of the above and the fact that the proposal could provide an additional wide coverage area service to Kirksville, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Kirksville, Missouri	229C2, 233C1 300C1	229C2, 233C, 300C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 17, 1989,** and reply comments on or before **March 6, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

David L. Nelson
President, KIRX, Inc.
4321 West College Avenue
Suite 402
Appleton, Wisconsin 54914

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It

should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 233C at Kirksville are 40-14-34 and 92-25-42.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-573

In the Matter of

Amendment of Section 73.202(b), RM-6495
Table of Allotments,
FM Broadcast Stations.
(Tawas City and Wurtsmith,
Michigan)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 18, 1988; Released: December 22, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration a petition for rule making filed by Tawas City Broadcasting, Inc. (petitioner), seeking the substitution of FM Channel 235A for Channel 269A at Tawas City, Michigan. Petitioner also requests modification of its license for Station WDBI(FM), to specify operation on Channel 235A. Petitioner submitted information in support of the proposal and expressed its intention to apply for the channel.

2. Channel 235A can be allotted to Tawas City in compliance with the minimum distance separation requirements of the Commission's Rules provided Channel 235A is deleted from Wurtsmith, Michigan.[1] Channel 235A was allotted to Wurtsmith in MM Docket 84-231. *See* First Report and Order, 50 FR 3514, January 25, 1985. The window period for filing applications for Channel 235A at Wurtsmith opened on May 12, 1988, and closed on June 16, 1988, and currently there are no applications on file at the Commission for the channel. Petitioner argues that Wurtsmith is not a community, but in fact is a Strategic Air Command Air Force Base located in Oscoda Township, which presently has two allotments. According to petitioner, moving Channel 235A from Wurtsmith to Tawas City would cause no harm to the Wurtsmith area, as it will be served by two facilities allotted to Oscoda. Petitioner requests the above modification to the Table of Allotments in order to eliminate a severe problem of interference to the reception of Station WDBI(FM) both within its principal city coverage contour and in its city of license. According to petitioner, the interference is caused by the operation of co-channel Station CKNX-FM, Wingham, Ontario, and is especially severe during summer months. Petitioner further states that it has installed a new technical facility which has improved its signal quality, but not enough to eliminate the interference.

3. The allotment of Channel 235A at Tawas City can be made at the petitioner's specified site 11.3 kilometers (7.0 miles) west of the community. Since Tawas City is located within 320 kilometers (200 miles) of the U.S.- Canadian border, Canadian concurrence must be obtained. We shall propose the modification of the license for Station WDBI(FM), Channel 269A, to specify operation on Channel 235A in accordance with Section 1.420(g) of the Commission's Rules. Accordingly, we seek comments on the proposed Amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below:

	Channel No.	
City	Present	Proposed
Tawas City, Michigan	269A, 284C2	235A, 284C2
Wurtsmith, Michigan	235A	—

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 17, 1989,** and reply comments on or before **March 6, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

David Tillotson
Arent, Fox, Kintner,
Plotkin & Kahn
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5337

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been

served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 235A at Tawas City at petitioners' specified site are 44-16-27 and 83-39-42.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-572

In the Matter of

Amendment of Section 73.202(b), RM-6564
Table of Allotments,
FM Broadcast Stations.
(Myrtle Beach, South Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 18, 1988; Released: December 22, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Myrtle Beach Broadcasting Limited Partnership (petitioner), requesting the substitution of Channel 221C2 for Channel 221A at Myrtle Beach, South Carolina, and the modification of its license for Station WJYR-FM to specify operation on the higher powered channel.

2. Petitioner states that the Myrtle Beach market is expanding rapidly but that the growth is not in a concentric circle but almost entirely in a long and slender band along the coast, stretching for approximately 65 miles from the North Carolina state line to Georgetown, South Carolina. While Station WJYR-FM's current facilities provide a city-grade signal over Myrtle Beach and adjoining villages, it states that the proposed upgrade would enable it to provide better service to the expanding market. It states that other stations serving Myrtle Beach have recognized the changing shape of the market and have recently sought and received upgrades from Class A to Class C2 facilities.

3. Petitioner goes on to state that Channel 221C2 can be allotted to Myrtle Beach in compliance with the Commission's minimum distance separation requirements. However, it recognizes that the allotment at Myrtle Beach would conflict with the application of noncommercial educational Station WFSS, Fayetteville, North Carolina, which seeks to amend its outstanding construction permit from Channel 206C1 (BPED-830119AG) to Channel 220C1 (ARN-860811MF). However, petitioner contends that the allotment of Channel 221C2 to Myrtle Beach would not prevent Station WFSS from being upgraded to Class C2 facilities on Channel 220. It contends that this would still provide Station WFSS with a substantial upgrade in facilities from its currently licensed 10 watts on Channel 201D. Further, it believes that Station WFSS may ultimately be able to upgrade to the Class C1 facilities specified in ARN-860811MF if the proposed rules concerning the use of directional antennas are adopted. *See*, MM Docket No. 87-121, 3 FCC Rcd 1820 (1988). There is no conflict between Station WFSS's operation on Channel 206C1 and Channel 221C2 at Myrtle Beach.

4. Finally, petitioner states that the adoption of its proposal would result in the overlap of the proposed Channel 221C2 1 mV/m contour and the Grade B contour of Station WECT(TV), Channel 6, Wilmington, North Carolina. In accordance with the dictates of the *First Report and Order* in MM Docket 86-144, 52 Fed. Reg. 8259, March 17, 1987, petitioner provides an engineering study demonstrating the impact of allotting Channel 221C2 to Myrtle Beach on the availability of Class A, C2, C1 and C noncommercial educational stations on Channels *218, *219 and *220.[1] The preclusion area was determined to be the areas within the predicted Grade B contour of Channel 6 TV Station WECT and between the 65 kilometer adjacent channel Class A to A minimum separation arc from the present Station WJYR Channel 221A operation and the 188 kilometer adjacent channel Class C2 to Class C minimum separation arc from the proposed Station WJYR Channel 221C2 site. It concludes that no new noncommercial educational allotments of any class are possible on Channels *218 and *220, but that a Class A allotment on Channel *219 is currently permitted in a small area that would be precluded by the proposed Station WJYR upgrade. According to the petitioner, this area covers 179 square kilometers with a population of 4,312 persons, but includes no cities, towns or Census Designated Places. However, it states that noncommercial educational Channels *202 through *206 are available for use with at least minimum Class A facilities within this precluded area. In addition, it states that commercial Channel 235A is also available in the precluded area. Based on this study, it concludes that the allotment of Channel 221C2 at Myrtle Beach will not adversely affect noncommercial educational service in the area.

5. At the time the Commission reintroduced the requirement for noncommercial educational FM preclusion studies in situations such as this one, little guidance was offered on the assumptions to be made. Thus, the submitted studies have varied significantly, making comparisons difficult and decisions more complicated than necessary. Accordingly, we wish to set out some guidelines here for these preclusion studies in general and, for this specific proposal, direct petitioner to supplement its preclusion study in initial comments to conform with these standards.

(a) The preclusion study should be done on each affected channel for each possible class of noncommercial FM station (that is, A, B1 and B in Zones I and I-A or A, C2, C1 and C in Zone II).

(b) For each class of noncommercial educational FM station, maximum power and antenna height and omnidirectional operation should be assumed.

(c) Preclusion should be considered to occur only if the noncommercial educational FM station would be prevented by the upgrade, and is not already precluded either by the existing Channel 221 station that is the subject of the proposal or by other commercial or noncommercial educational FM stations.

(d) Preclusion should be determined both inside and outside the Channel 6 Grade B contour. While the existence of the Channel 6 station imposes a burden on noncommercial educational FM applicants, determination of the preclusive effect of the Channel 6 station can be complicated and may be

dependent on the particular transmitter site selected. Therefore, the initial preclusion area determination should be done without considering the Channel 6 station's impact. The Channel 6 impact can be included at a later stage of study, if necessary.

(e) Within any identified preclusion area, significant communities, normally those with a population in excess of 1,000, should be identified. Existing local noncommercial educational FM stations in the precluded communities should be listed.

(f) Optionally, if precluded communities without local noncommercial educational FM service are found, additional information can be provided, including:

(i) Availability of noncommercial educational FM service from stations licensed to nearby communities;

(ii) Availability of other channels for a noncommercial educational FM station in the precluded community (include consideration of Channel 6 station impact); and

(iii) Impact of Channel 6 on noncommercial educational FM channel availability in the community. If a precluded community is a reasonable distance beyond the Grade B contour of the Channel 6 station, then it is possible that the Channel 6 station has no effect on the availability of a particular class of noncommercial educational FM station in that community. The noncommercial educational FM channel that is closest to Channel 6 in frequency, and therefore most likely to be affected, is Channel 201. Preclusion in a community that is beyond the Channel 6 impact distance is not significant. The appropriate impact distance for Class C stations is found in Table A of Section 73.525(a)(1) of the Commission's Rules. Lesser distances are appropriate for other classes of noncommercial educational FM stations. For convenience, the distances have been calculated for Channel 201 and are as follows:

Class	Distance from station Channel 6
A	165 kilometers
B1	189 kilometers
B	207 kilometers
C2	207 kilometers
C1	234 kilometers
C	265 kilometers

Precluded communities within these distances from the Channel 6 station generally constitute a negative factor to be weighed against the public interest gains sought through the upgrade.

6. We believe the public interest would be served by seeking comments on the substitution of Channel 221C2 for Channel 221A at Myrtle Beach, South Carolina, since it could enable Station WJYR to increase its coverage area. Channel 221C2 can be allotted to Myrtle Beach in compliance with the Commission's minimum distance separation requirements and can be used at the station's present transmitter site.[2] Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Myrtle Beach, South Carolina	221A, 269C2	221C2, 269C2

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **Febraury 17, 1989,** and reply comments on or before **March 6, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

James F. Rogers, Esq.
Latham & Watkins
1001 Pennsylvania Avenue, N.W.
Suite 1300
Washington, D.C. 20004-2505
(Counsel to petitioner)

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. IT IS ORDERED, That the Secretary SHALL SEND a copy of this *Notice of Proposed Rule Making*, by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the applicant for Channel *220C1 at Fayetteville, North Carolina, as follows: Fayetteville State University, Station WFSS, 1200 Murchison Road, Fayetteville, North Carolina 28301.

11. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an

ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The Commission stated therein that "[i]t is appropriate to ensure the continued availability of adequate noncommercial educational radio services in TV Channel 6 markets. Thus, where the Grade B contour of the Channel 6 TV station and the 1 mV/m contour of the proposed upgraded facility on Channel 221 would overlap, a petitioner seeking to upgrade will bear a particularly heavy burden in demonstrating that a grant of its request to upgrade is in the public interest."

[2] The coordinates for this allotment are North Latitude 33-42-56 and West Longitude 78-52-56.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-571

In the Matter of

Amendment of Section 73.202(b),	RM-6460
Table of Allotments,	
FM Broadcast Stations.	
(Plainview, Texas)	

NOTICE OF PROPOSED RULE MAKING

Adopted: November 30, 1988; Released: December 22, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Adams-Shelton Communications (petitioner), licensee of Station KKYN-FM,[1] Channel 280A, Plainview, Texas, the Commission considers herein a petition for rule making seeking the substitution of Channel 280C1 for Channel 280A at Plainview. Petitioner also seeks the modification of its license to specify operation on the higher class co-channel, in order to provide Plainview with its third wide coverage area FM service. Petitioner submitted information in support of its proposal.

2. The substitution can be made consistent with the Commission's minimum separation requirements at the station's present transmitter site.[2] However, there is a short spacing to Station KKTC(FM), Channel 280A at Brownfield, Texas, which may be eliminated once Station KKTC(FM) is licensed on Channel 282C2. [3] Therefore, this proposal is contingent upon Station KKTC(FM) receiving a construction permit and being licensed on Channel 282C2.

3. As requested, we shall propose to modify the license of Station KKYN-FM to specify operation on the higher class co-channel, Channel 280C1. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Plainview.

4. The Commission believes it is in the public interest to solicit comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Plainview, Texas	247C1, 280A, 295C2	247C1, 280C1, 295C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **February 17, 1989,** and reply comments on or before **March 6, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Thomas J. Hutton, Esquire
Dow, Lohnes & Albertson
1255 Twenty Third Street, N.W.
Suite 500
Washington, D. C. 20037
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Formerly Station KPMB(FM).

[2] The coordinates are 34-13-05 and 101-42-02.

[3] *See Report and Order* in MM Docket No. 87-603 which authorized Station KKTC(FM) to specify operation on Channel 282C2.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-563

In the Matter of

Amendment of Section 73.202(b), RM-6441
Table of Allotments.
FM Broadcast Stations.
(Russell Springs, Kentucky)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 29, 1988; Released: December 22, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by P&G Communications-Kentucky (Petitioner), requesting the allotment of Channel 300A to Russell Springs, Kentucky, as the community's first local FM service. Petitioner states that he will apply for the channel, if allotted. Channel 300A can be allotted to Russell Springs in compliance with the Commission's minimum distance separation requirements with a site restriction of 0.6 kilometers (0.4 miles) south of Russell Springs.[1]

2. We believe the public interest would be served by proposing the allotment of Channel 300A to Russell Springs, since it could provide the community with its first local FM service. Accordingly, we seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Russell Springs, Kentucky	–	300A

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **February 17, 1989,** and reply comments on or before **March 6, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Paul H. Reynolds
Amerimedia, Inc.
415 N. College Street
Greenville, AL 36037
(Consultant for Petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment

is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 300A at Russell Springs are 37-03-00 and 85-05-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-121

In the Matter of

Amendment of Part 73 of the
Commission's Rules to Permit
Short-spaced FM station assignments
by using Directional Antennas

ORDER GRANTING MOTION FOR EXTENSION OF TIME FOR FILING COMMENTS

Adopted: May 26, 1988; Released: May 27, 1988

By the Chief, Mass Media Bureau:

1. On March 30, 1988, the Commission released a *Notice of Proposed Rule Making* (*Notice*) in the captioned matter.[1] In the *Notice*, the Commission proposes amending the rules to permit use of short-spaced FM transmitting antenna sites in certain circumstances, use of FM directional antennas by short-spaced stations, and related matters. Comments on the proposal were to be filed on or before May 27, 1988, with replies on or before June 27, 1988. On May 10, 1988, Greater Media, Inc. (Greater Media) filed a motion requesting that the comment period be extended to August 5, 1988.

2. In its motion, Greater Media appears concerned that the *Notice* expands the scope of this proceeding beyond what was originally contemplated in the initial *Notice of Inquiry* in this proceeding. Specifically, it believes that the proposals in the *Notice* seem to presage a transition to a demand-based allocation system which is premised upon contour protection, rather than mileage separations and a Table of Allotments. As evidence of this intention, it alleges that that the *Notice* proposes to introduce the use of directional antennas in the allocation process, to allow short-spaced stations to accept interference, and to reduce the contour protection standards applicable to Class B stations. In view of the complex nature of these purported proposals, Greater Media believes an extension in the comment period is necessary to allow it and other interested members of the industry to complete their review and formulate a satisfactory response.

3. While we agree with Greater Media's assessment of the complexities of the technical issues under study, we believe that Greater Media has overstated the intent of this proceeding regarding the Commission's fundamental channel allotment policy. Nonetheless, in light of the depth and complexity of the proposed interference protection standards, directional antenna issues, and other related technical matters raised in the *Notice*, we believe that additional time for filing comments is warranted, and that the public interest would be served by a grant of Greater Media's request.

4. Accordingly, IT IS ORDERED THAT the Motion for Extension of Comment and Reply Comment Dates filed by Greater Media, Inc. IS GRANTED and that the dates for filing comments and reply comments are EXTENDED to August 5, 1988 and September 5, 1988, respectively.

5. This action is taken pursuant to authority found in Section 4(i) and 303(r) of the Communications Act of 1934, as amended and Sections 0.204(b), 0.283, 1.46 and 1.45 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Alex D. Felker
Chief, Mass Media Bureau

FOOTNOTE

[1] *See* FCC 88-73, 3 FCC Rcd 1820 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SATELLITE CORPORATION, COMSAT INTERNATIONAL COMMUNICATIONS, INC., COMSAT TECHNOLOGY PRODUCTS, INC., and AMERICAN SATELLITE COMPANY, d/b/a CONTEL ASC	File No. ENF-87-18
Application for Consent to Transfer Control of and to Reissue Commission Authorizations	
EQUATORIAL COMMUNICATION SERVICES, and AMERICAN SATELLITE COMPANY, d/b/a CONTEL ASC	File Nos. 5725-DSE-TC-87(5000) 5726-DSE-TC-87(4) CSG-87-065(TC) ITC-87-172
Application for Consent to Transfer Control	

MEMORANDUM OPINION AND ORDER

Adopted: December 12, 1988; Released: December 23, 1988

By the Commission:

1. Wold Communications, Inc. (Wold) and Satellite Transmission and Reception Specialist Company (STARS) have filed applications for review of the Common Carrier Bureau's order granting the above-captioned application of Communications Satellite Corporation (COMSAT), COMSAT International Communications, Inc. (CICI), COMSAT Technology Products, Inc. (CTP), and American Satellite Company, d/b/a Contel ASC (Contel ASC) for transfer of control and the reissuance of Commission authorizations.[1] STARS also requests review of the order granting the above-captioned application of Equatorial Communication Services (Equatorial) and Contel ASC.[2] COMSAT and Contel ASC oppose both applications for review [3] and STARS has filed a reply and an addendum.[4]

2. Both Wold and STARS had petitioned the Commission to place conditions on any grant of the COMSAT/Contel ASC application, and STARS had requested that the Commission place conditions on the Equatorial/Contel ASC application. Those petitions were denied in the Bureau orders. Accordingly, Wold and STARS request that the Commission review the Bureau orders and place the conditions described below on the grants. For the reasons stated below, we deny both applications for review.

I. THE WOLD APPLICATION FOR REVIEW

A. Background

3. The *COMSAT Order*, *inter alia*, granted an application to transfer control of CICI to Contel ASC.[5] That Order denied a petition by Wold to condition the grant on the elimination from CICI Tariff F.C.C. No. 2 of termination charges imposed on customers of the Santa Paula earth station.[6] The Bureau concluded that the proposed condition was beyond the scope of the proceeding and noted that the Commission had twice rejected Wold's argument against the termination charges.[7] Contrary to Wold's arguments in the *COMSAT* proceeding, the Bureau found that the identity of the owner of the earth station did not change the rationale behind the Commission's earlier decision.[8] The Bureau also stated that if Wold believes that the provision of service by the new owner is unlawful, it may file a complaint pursuant to Section 208 of the Communications Act, 47 U.S.C. § 208.[9]

B. Contentions of the Parties

4. In its application for review, Wold requests that the Commission reexamine the Bureau's decision not to condition the authorization for transfer of control upon removal of the Santa Paula termination charges. Wold maintains that the Bureau's decision was erroneous in several respects. First, Wold contends that the Bureau ignored the requirements of the Communications Act and established Commission precedent when it ruled that the requested condition was beyond the scope of the proceeding. It argues that such provisions are anticompetitive and have discouraged establishing competing earth stations serving that region and have denied Santa Paula video customers "the benefits of competition which was intended to flow from the Commission's 1985 Comsat Structure decisions." (footnote omitted) Wold Application at 2-3. Wold asserts that promotion of competition is one of the public interest factors which the Commission considers and the Commission has not hesitated to place appropriate conditions on authorizations in the past. Indeed, it asserts that the "Commission has a statutory *duty* to consider allegations of competitive harm in the context of Title III licensing, including applications filed pursuant to Section 310 of the Act: *See* 47 U.S.C. §§313-14; 15 U.S.C. §21 . . . ." Wold Application at 6. Despite such authority, Wold maintains that the Bureau ignored its arguments regarding the anticompetitive impact of the termination charges. Wold also argues that the Bureau ignored its argument that the basis for the termination requirement – to protect COMSAT's other ratepayers from loss associated with the Santa Paula earth station – was eliminated by the sale of CICI to Contel ASC. It cites 47 U.S.C. § 309 (d)(2) as support for its allegation that the Bureau erred by failing to address all substantial issues raised by its petition. Wold Application at 7-8. Finally, Wold suggests that the Bureau decision may have been based on the mistaken belief that the international video service market between the United States and Pacific Ocean Region countries was fully competitive.[10]

5. In their oppositions, both COMSAT and Contel ASC support the decision in the *COMSAT Order*. They state that the Bureau correctly concluded that who owns the Santa Paula earth station is not relevant to the issue of the tariff termination provision. Both note that the Commission has already twice rejected Wold's contention that this termination clause should be eliminated,[11] and they agree with the Bureau's conclusion that the proper venue, if any, to review the termination charge is in a complaint proceeding. COMSAT adds that even if the Commission were required to review Wold's argument yet again, it would not be required to do so in this proceeding, but has broad discretion to conduct its proceedings in the manner it chooses.

C. Discussion

6. We have reviewed all of Wold's arguments and affirm the Bureau decision. While Wold is correct that the promotion of competition is one of the public interest factors which the Commission considers and that the Commission has not hesitated to place appropriate conditions on its authorizations, conditions were not appropriate in the instant proceeding. The issue in the instant proceeding is whether the transfer of certain businesses from COMSAT and its subsidiaries to Contel ASC is in the public interest. Wold has not asserted that such a transfer itself is anticompetitive or that the market would be more anticompetitive if certain businesses were transferred from COMSAT to Contel ASC than if such businesses remained with COMSAT. Instead, it argues that one existing tariff provision for one earth station involved in the transfer is anticompetitive. Implicit in the Bureau's grant of the application was the finding that the transfer of ownership of the Santa Paula earth station from CICI to Contel ASC would have no anticompetitive effects on the market, and that from a broader perspective, grant of the COMSAT/Contel ASC application would promote competition. We agree with that finding. As to the issue regarding the termination provision, the Bureau properly rejected Wold's arguments. The Commission's complaint procedure is the appropriate vehicle to redress alleged anticompetitive or otherwise unlawful tariff provisions that are currently in effect. In light of our decision here, there is no need to address in further detail Wold's contention that the Bureau ignored arguments advanced by Wold or may have based its decision on a mistaken belief about the nature of the video service market. If Wold wishes to pursue this matter, the appropriate forum is a complaint proceeding filed pursuant to Section 208 of the Act.

II. THE STARS APPLICATION FOR REVIEW

A. Background

7. The Bureau orders denied petitions by STARS to place various conditions on the grant of the COMSAT/Contel ASC and Equatorial/Contel ASC applications. In the COMSAT proceeding, STARS sought to condition that portion of the grant which permitted CTP's domestic very small aperture terminal (VSAT) earth station authorizations to be reissued to Contel ASC and which authorized transfer of control of CICI to Contel ASC.[12] Contrary to STARS' assertions,[13] the Bureau concluded that the relevant markets within which to review the competitive impact of the grants is the domestic interexchange market, the international message toll service (IMTS) market, and the non-IMTS market. The Bureau stated that VSATs are part of the domestic interexchange market and do not constitute a separate market.[14] Even though its acquisition of CTP's VSATs would increase its share of VSATs, the Bureau found that Contel ASC's entire VSAT business, less than one percent of the market even after the reissuance, would amount to only a miniscule portion of the domestic interexchange market.[15]

8. Likewise, the Bureau found that IBS and international television services are part of the non-IMTS market.[16] The Bureau concluded that Contel ASC's share of the IBS market, even after the acquisition of CICI, will be *de minimis*.[17] The Bureau noted that since Contel ASC did not currently provide international television services and would be entering the market as one of many competitors, its acquisition of CICI would result in no change in that competitive market segment.[18] Thus, the Bureau concluded that Contel ASC's acquisitions will not change its nondominant status under the principles of both the *Competitive Carrier* and *International Competitive Carrier* decisions and that the present regulation of nondominant carriers provides adequate procedures to rectify competitive abuses that may occur with Contel ASC.[19] The Bureau concluded that STARS had made no showing as to how "relationships" between Contel ASC and COMSAT arising out of the agreement would give Contel ASC an advantage over its competitors or leverage over COMSAT.[20]

9. Similarly, the *Equatorial Order* concluded that Equatorial's transfer of control to Contel ASC would not have an adverse public interest impact on either domestic or international communications markets and thus that there was no support for the imposition of the conditions requested by STARS.[21] The Bureau reiterated the relevant market analysis conducted in the *COMSAT Order* and concluded that Contel ASC's acquisition of Equatorial assets would have a *de minimis* competitive impact on the domestic interexchange market or the non-IMTS market.[22]

B. Contentions of the Parties

10. In its application for review, STARS argues that the Comission should place conditions on both the COMSAT/Contel ASC and the Equatorial/Contel ASC authorizations for transfers of control.[23] It contends that the Bureau orders failed to take the required "hard look" at the issues, arguments, and evidence STARS had presented. Application at 2. STARS presents five issues for review.

11. *Anticompetitive Actions*. STARS states that it presented "verified, uncontradicted evidence of anticompetitive activity by Contel." Application at 2. It claims that it showed that with the COMSAT and Equatorial acquisitions, Contel ASC would engage in anticompetitive conduct and dominate markets involved in this proceeding. *Id*. Examples of Contel ASC's anticompetitive conduct, according to STARS, include alleged bundled and cross-subsidized pricing and exclusive arrangements with other carriers. STARS claims that it has been victimized by predatory pricing practices of Contel ASC. It states that Contel ASC provided free domestic transmission services from the southwest to the east coast of the United States for customers taking service to Europe, depriving STARS of the opportunity to compete for the IBS business of these potential customers. STARS asserts that Contel ASC intends to dominate its markets, and relies on various press clippings and public documents such as Contel

ASC's annual reports. STARS maintains that the Commission cannot ignore Contel ASC's past anticompetitive conduct and allow it to continue such practices with impunity; the appropriate remedy is to adopt the proposed procompetitive conditions. It claims that the proposed conditions were designed to prevent further instances of practices by Contel ASC which it characterizes as violations of the Communications Act and/or Commission policy.

12. *Conditions*. Next, STARS argues that while the *Competitive Carrier* decisions[24] might provide guidance for determining whether mergers should be approved, they do not "dictate whether mergers should be subjected to procompetitive conditions." Application at 2. STARS concedes that the *Competitive Carrier* decisions might be controlling as to the outright grant or denial of acquisition applications, but it contends that these decisions are not controlling as to whether conditional grants should be issued. It contends that the Bureau should have followed Commission precedent and subjected the approvals to procompetitive conditions. Specifically, STARS asserts that the 1983 *Competitive Carrier* decision[25] did not overrule prior Commission precedent that merger approvals should be subject to procompetitive conditions. STARS characterizes the Bureau orders as misapplying the *Competitive Carrier* decisions and concludes that, under this misapplication, all domestic and IMTS merger applications will be approved automatically if AT&T is not an applicant.

13. *Technological Changes*. STARS also alleges that the Bureau erred in considering technological changes and service evolutions immaterial and in denying STARS the opportunity to assist in exploring and evaluating these matters. STARS states that the Bureau did not attempt to ascertain and evaluate "the emerging technological aspects of VSAT services and products, and their interrelationship with IBS and video services." It maintains that the Bureau classified VSAT service as part of the domestic interexchange market and did not address the issue of manufacturing. Application at 5. As support for its argument that recent technological changes and service evolutions should not be ignored in evaluating whether to grant conditional approvals of mergers, STARS states that since the *Competitive Carrier* decisions, on which the Bureau decisions were based, VSATs have begun to spread to foreign markets, and the VSAT and IBS markets are coalescing. Therefore, it maintains that the decision violates the Commission's "affirmative duty to re-examine [its] policies in light of changed circumstances to determine whether they still further the public interest."[26] STARS maintains that the "emergence of VSATs in foreign countries will spread Contel's tentacles through its acquisition of CTP and Equatorial." Application at 18. STARS requests that the Commission require applicants to submit additional information, including a description of the VSAT manufacturing operations transferred to Contel ASC.

14. *Contel ASC's Influence Over COMSAT*. Finally, STARS maintains that the Bureau misunderstood "the significance to the competitive retail satellite carriers of Comsat's monopolistic control over the international satellite space segment." Application at 6. It claims that the Bureau orders ignored STARS' concerns about Contel ASC's potential contractual leverage over COMSAT. Moreover, according to STARS, the Bureau orders disregarded the Commission's efforts to inject COMSAT into the retail sector. It contends that Contel ASC has effectively "replaced the FCC as the arbiter of any future Comsat retail activity in the IBS, VSAT and video sectors." *Id*. Finally, STARS argues that as a monopoly supplier of international satellite capacity, COMSAT should be considered an atypical carrier and therefore Contel ASC's contractual influence over COMSAT should be subject to regulatory restraints. STARS contends that since it had no opportunity to inspect the schedules that supported the agreement in order to determine the extent of Contel ASC's influence, the noncompetition provision of the agreement is an illustration of a possible contractual influence. STARS views this evidence in a manner at variance with the Bureau, claiming it shows COMSAT's unique position as a monopoly supplier of international satellite capacity and as the subject of the Commission's *Authorized User* policy.[27]

15. *Other Alleged Errors*. Other alleged infirmities of the Bureau orders include allegations that they did not contain affirmative findings that the acquisitions are in the public interest. Moreover, STARS attacks the denial of its request that the various descriptive schedules supporting the acquisition agreements be made public, despite the fact that no proprietary claims were pleaded.

16. In support of its proposed conditions, STARS argues that no party made a showing that the conditions would be burdensome or contrary to the public interest. Indeed, it alleges that since Contel ASC has already consummated the COMSAT and Equatorial acquisitions, although the issue of possible conditions is still before the Commission, imposition of those conditions would not be a deterrent to the acquisitions.

17. Both Contel ASC and COMSAT argue that the Bureau correctly relied on the *Competitive Carrier* and *International Competitive Carrier* decisions. COMSAT states that the *COMSAT Order* [28] did not deny the existence of new markets, but that STARS failed to make a factual demonstration that new markets had emerged. Absent such a showing, the Bureau properly relied on established precedent. It also points out that the Bureau did not assume that it had no authority to impose conditions, but rather refused to impose them because STARS did not demonstrate a public interest justification for the conditions. As to the two conditions that STARS again seeks to impose upon COMSAT, COMSAT argues that the sales agreement does not grant Contel ASC leverage over COMSAT that could be used against competitors. Moreover, it notes the Commission already has the authority to obtain any information it needs from COMSAT or Contel ASC regarding transactions between them. In addition, accounting procedures already exist which govern cost allocations between COMSAT's jurisdictional and nonjurisdictional activities. COMSAT concludes that the *COMSAT Order* took the required "hard look" at the issues raised in the application proceeding, and STARS has demonstrated no basis to set aside the Bureau's conclusions of fact and law in that order.

18. Contel ASC argues that STARS' only complaint is that it is facing competition from Contel ASC. It states STARS' allegations of Contel ASC's anticompetitive activities are unsupported in fact or law and depend on erroneous assertions of the markets involved as well of Contel ASC's position in those markets. Contel ASC contends that the fact that it did not choose "to respond point-by-point to STARS' irrelevant complaints and allegations did not and cannot constitute any 'admission'

with respect thereto." Opposition at 6, n.6. Contel ASC concludes that there is no public interest reason to burden it with the conditions proposed by STARS; it characterizes the conditions as anticompetitive, unnecessary, and an attempt to "thwart rather than enhance *bona fide* competition serving the public interest." *Id.* at 7.

C. Discussion

19. *Anticompetitive Actions.* As stated above, STARS justifies its request that the Commission impose conditions on Contel ASC as necessary to prevent a repetition of past anticompetitive acts by Contel ASC. After a thorough review of the record, we conclude that the Bureau properly granted the applications without conditions. While we agree with the abstract proposition that anticompetitive acts should not be ignored by the Commission, we do not believe that STARS has proved that Contel ASC's described behavior was anticompetitive. Contrary to STARS' representation that it presented "verified" evidence of Contel ASC's anticompetitive activity, it presented no probative evidence of such behavior, only bald unsupported assertions. STARS has failed to cite a single order to support its argument that Contel ASC's actions were violations of the Communications Act and of Commission policy. For example, it alleges that one of Contel ASC's anticompetitive tactics has been bundled and cross-subsidized pricing. An example of the alleged "predatory pricing practices" of Contel ASC is the provision of free domestic transmission services from the southwest to the east coast. Application at 8. It asserts that this free service is an unlawful rebate in violation of Section 203(c) of the Communications Act. *Id.* at 10. STARS provides no further details of what free service was provided to whom and when and, likewise, provides no evidence whatsoever to support its allegations. Without such information, it is impossible for us to conclude that the alleged practices are anticompetitive.

20. STARS' single example of exclusive dealing arrangements with other carriers is that when STARS approached General Communications, Incorporated (GCI) to become the connecting carrier for satellite service to Alaska from a Houston area customer, GCI allegedly told STARS that "the service order would have to be cleared with Contel who would undoubtedly insist that STARS shorthaul itself by routing the customer to Contel's Dallas earth station for onward transmission by Contel to Alaska." *Id.* at 9. STARS claims that "Contel's Alaskan bottleneck" is confirmed by a news release which stated that "Contel ASC is now the *only* satellite carrier with direct access to Hawaii, Alaska and Puerto Rico." (Emphasis added by STARS.) *Id.* at 9-10. STARS states that the exclusive arrangement of Contel ASC with GCI violates the Commission's "longstanding policy against exclusive arrangements." *Id.* at 10. Again the record is devoid of adequate evidence to support STARS' allegations. STARS relies on multiple hearsay and anecdotal allegations. Certainly no weight can be given to a hearsay statement indicating an unnamed GCI employee's opinion of Contel ASC's probable future actions. Nor is the press release stating that Contel ASC is the only carrier with direct access to Alaska evidence of an unlawful exclusive arrangement. Indeed, even though Contel ASC might have been the only carrier with direct access to Alaska, that fact would not prove that it was because of any anticompetitive actions by Contel ASC, or that other carriers could not serve Alaska by other routes. Moreover, even if there were an exclusive arrangement between Contel ASC and GCI, a nondominant carrier, it is unclear why that would foreclose STARS from finding other routes by which it could provide service to Alaska.

21. STARS' claim that its allegations of anticompetitive behavior are uncontradicted or denied is also without merit. Contel has generally denied the allegations made by STARS. In addition, we do not believe that STARS' unsupported allegations constitute actual evidence of anticompetitive behavior.[29] In these circumstances we do not find it decisionally significant that Contel did not directly contradict each specific allegation of anticompetitive conduct. However, Contel ASC generally denied that grant of the applications would be anticompetitive. The proceedings before the Bureau were applications for consent to transfer control to determine if proposed future acquisitions would be in the public interest; they were not complaint proceedings to determine if past actions of Contel ASC had been unlawful. In these circumstances, Contel's failure to address these allegations with specificity cannot be viewed as a concession of anticompetitive or unlawful actions. Likewise, a statement made to the press or to Contel ASC's shareholders may be evidence that the company plans to compete or is competing in a certain area, but it is not evidence that the competition is being conducted unlawfully. The content of press conferences and annual reports must be viewed in context: their purpose is to publicize the company in a positive light to the intended audience. For example, a Contel ASC official's statement that the company is "well positioned to dominate" the VSAT market does not persuade us that Contel ASC will be dominant as that term of art is used at this Commission. Therefore, since the record does not support STARS' allegations of anticompetitive acts by Contel ASC, the Bureau gave proper weight to the matter in its analysis of the merger applications.

22. *Technological Changes.* STARS maintains that the Bureau misapplied the *Competitive Carrier* decisions by mechanically looking only at the entire domestic interexchange, international message telephone service (IMTS), or non-IMTS markets and not considering emerging sectors of the markets in which competition might be wiped out. We agree with the argument that technological change and service evolution need to be considered in any decision where appropriate. The Commission indeed reexamines its policies in light of changed circumstances and reviews past decisions to ensure that they are consistent with present technology. However, STARS has not presented any evidence that the composition of the relevant markets or that current technologies have changed to an extent that we should reexamine the *Competitive Carrier* and *International Competitive Carrier* decisions. STARS attempts to segment the markets we have already established, and while recognizing the markets delineated in the *Common Carrier* decisions, in effect insists that there is a separate VSAT market. For example, STARS continues to refer to the VSAT market and Contel ASC's alleged dominance in that market. However, the mere fact that there are technological advances that introduce new services which are competitive with services in a market category is not proof of a separate submarket or that the categories are erroneous. In fact, although STARS argues that the "VSAT and IBS markets are coalescing,"[30] STARS itself admits that VSATs and IBS are competitive in the marketplace. Therefore, absent probative evidence on the record that the market categories are erroneous,

which STARS has not demonstrated, the relevant markets are the domestic interexchange and non-IMTS markets. It would be inappropriate to impose conditions that would treat Contel ASC as dominant in the VSAT sectors of the relevant markets.

23. *Contel ASC's Influence Over COMSAT.* We turn next to the question of whether Contel ASC's contractual relationship with COMSAT should be subject to regulatory restraints. We have already recognized the atypical aspects of COMSAT that require special oversight and have required COMSAT to comply with certain accounting procedures and structural separation requirements.[31] Moreover, we have reviewed the record and find no evidence that Contel ASC will be able to exert any contractual influence over COMSAT except for the noncompetition agreement not to compete in the businesses sold for three years after the closing date. We note that federal antitrust laws do not find noncompetition clauses are *perse* unlawful.[32] The noncompetition clause in this agreement appears to be a typical contractual provision limited to the businesses sold and for a limited period of time. The record does not contain any evidence that this provision could be used to harm Contel ASC's competitors. Nor is there anything in the schedule relating to the provision that would give Contel ASC influence over COMSAT. In view of the above and since STARS has presented no convincing arguments that its proposed conditions would be in the public interest, the Bureau correctly declined to impose them.

24. *Conditions.* We agree with STARS that the *Competitive Carrier* decisions did not overrule prior Commission precedent holding that conditions could be attached to merger approvals in appropriate circumstances. However, STARS has completely mischaracterized the Bureau's actions in its filing. The Bureau did not find that it had no authority to attach conditions to the merger approvals. Rather, the Bureau concluded based on its own review and on the fact that STARS had not provided evidence which justified imposing conditions on COMSAT or Contel ASC, or that the imposition of conditions on the grants was unwarranted.

25. As discussed above, STARS has submitted no evidence of anticompetitive or other unlawful activities by Contel ASC to justify its proposed conditions. In short, it has failed to provide a reasoned analysis, supported by probative evidence, of how the proposed transfers of control would be anticompetitive. Indeed, to impose the conditions proposed by STARS, including deeming a carrier which we have already determined to be nondominant in the relevant markets as dominant, would in itself impede competition in the market. Moreover, STARS' proposed conditions requiring the retention of records and that COMSAT be subject to the continuing jurisdiction of the Commission to account for various costs and cost allocations are unnecessary. COMSAT is already subject to the continuing jurisdiction of the Commission, and the Commission has oversight over its accounting procedures and can request whatever documentation it requires. However, while we find the proposed conditions to be unwarranted and unduely burdensome based on the record before us, we note that STARS always has the opportunity to file a complaint if it believes Contel ASC is violating the Communications Act. 47 U.S.C. § 208.

26. *Other Alleged Errors.* We also reject STARS' other arguments as being without legal support. Turning to the denial of its request that the various schedules to the agreements be made public, we have reviewed the supplemental schedules and agree with the Bureau that all pertinent information from the schedules is included in the applications themselves.[33] Nor are the Bureau orders defective because of the lack of explicit public interest findings. While the orders did not expressly so state, we believe it is implicit within them that the Bureau found in granting the applications in accordance with Section 310(d) of the Communications Act, 47 U.S.C. § 310(d), that the public interest would be served thereby. In order to clarify the matter, we independently conclude, in this order that granting the transfer of control applications, without conditions, serves the public interest, convenience, and necessity.

III. CERTIFICATE AND ORDERING CLAUSES

27. Accordingly, IT IS CERTIFIED that the transfers of control approved in this order WILL SERVE the public interest, convenience, and necessity.

28. IT IS ORDERED that the Application for Review filed by Wold Communications, Inc. IS DENIED.

29. IT IS FURTHER ORDERED that the Application for Review of Satellite Transmission and Reception Specialist Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

CONDITIONS PROPOSED BY STARS

1. As an integrated supplier of manufactured earth stations and of satellite space segment capacity, both domestic and international, Contel is absolutely prohibited from the bundled pricing of any of the aforesaid service components, or from cross-subsidizing one component with revenues from another component. For a period of three years from the last date of the consummation of the CICI/CTP/Equatorial acquisitions, Contel must specify separately in service proposals and in invoices for actual services, separate and appropriate prices for earth stations or earth station services, for domestic space segment capacity, for international space segment capacity, and for any terrestrial transmission lines connecting between any of (a) customers' premises, (b) domestic earth stations, or (c) U.S. international earth stations. Contel must retain the aforesaid proposals and invoices for a period of three years and make them available for inspection (a) by the Commission upon its request; and (b) by an independent national auditing firm who shall certify annually to the Commission whether Contel is in total compliance with the requirements of this Condition No. 1.

2. For a transitional period of three years from the last date of the consummation of the CICI/CTP/Equatorial acquisitions, Contel shall be deemed a dominant carrier,

as defined in § 61.12(c) of the FCC Rules, for purposes of compliance with the dominant carrier tariff regulations as contained in Part 61 of the Rules.

3. For a period of three years after the consummation of the Equatorial acquisition, Contel shall accord to STARS and to any other similarly-situated business entity, no less favorable prices, terms, conditions, quality and delivery schedule for VSAT-type terminals designed, assembled or manufactured by the former Equatorial facilities (including any successors, substitutes or additions thereto), than are offered or made available to Contel (including its affiliates and successors).

4. For the period of time that relationships between Contel and Comsat, arising from their Purchase Agreement of July 2, 1987, continue in effect, Contel and Comsat are each required to keep detailed records of each transaction relating to such continuing relationships. These records should be retained for a period of three years after the termination of the last intercompany relationship, arising from the Purchase Agreement, and shall be made available for inspection by the Commission upon its request.

5. Comsat shall be subject to the continuing jurisdiction of the Commission (a) to account for the proceeds of the sale of CICI and CTP, and (b) to justify Comsat's cost allocations between its jurisdictional and nonjurisdictional businesses; all for the purposes of insuring that Comsat's Intelsat and Inmarsat space segment rates properly reflect the relief from Comsat's divestitures and are not burdened (a) with any remaining costs or overheads appropriately assignable to the divested businesses; or (b) with any administrative and legal costs attributable to the earlier terminated Contel/Comsat merger proposal or to the instant CICI/CTP transaction.

FOOTNOTES

[1] Communications Satellite Corp., 2 FCC Rcd 7202 (Com. Car. Bur. 1987) (*COMSAT Order*). That order considered two applications, File Nos. ENF 87-18 and ENF 87-20. Both applications request review of only ENF 87-18, which involves a transfer of control of certain COMSAT assets to Contel ASC.

[2] Equatorial Communication Services, 2 FCC Rcd 7297 (Dom. Fac. Div. 1987) (*Equatorial Order*). Hereinafter, we refer to the *COMSAT Order* and the *Equatorial Order* collectively as the Bureau orders.

[3] COMSAT was not a party to the *Equatorial* proceeding and its opposition responds only to that part of STARS' application for review related to the *COMSAT Order*.

[4] STARS also filed a Contingent Request for Acceptance of Reply. It states that Section 1.115(d) of the Rules accords applicants for review of an action taken pursuant to delegated authority the right to reply, but that Section 1.115(f) appears to restrict such right. 47 C.F.R. §§ 1.115(d) and (f). It argues that Section 1.115(f) is not applicable in the instant case. However, it requests that if the Commission should deem that section applicable, it accept STARS' reply. We have accepted the reply in order to have a complete record before us. In view of the action taken herein, no one would be prejudiced by our consideration of the reply. Therefore, it is unnecessary to rule on or address the issues contained in the request.

[5] CICI is a COMSAT subsidiary that provides various competitive services.

[6] A condition to the Commission's authorization of the construction of COMSAT's Santa Paula Standard B earth station, granted in 1982, was that the costs of the facility must be borne by the customers utilizing the facility, not by other COMSAT ratepayers. To implement this condition, COMSAT included a termination charge in its tariff if a customer terminated service at this facility in less than nine years, at which time COMSAT expected to have recovered its construction costs. After COMSAT's earth segment holdings were transferred from COMSAT World Systems Division to CICI in 1985, CICI issued new tariffs containing essentially the same termination provision. Wold's petition to reject or suspend that tariff, based on its objection to the termination provision, was denied as was its application for review of that decision.

[7] *COMSAT Order*, 2 FCC Rcd at 7205.

[8] The Bureau stated:

> Since this facility was built to provide service to a particular user, that user, plus any others who later contracted for the service, should pay the construction costs involved if they discontinued service before those costs were recovered. The customers of the Santa Paula earth station agreed to the terms of service, including the termination charge. They will not be relieved from those terms merely because a new owner is providing the service.

Id.

[9] *Id.*

[10] Wold surmises that this belief "may have resulted from an incomplete and misleading eleventh-hour submission by CICI in apparent response to an oral request of which Petitioners were neither informed nor invited to comment." Wold Application at 3.

[11] Communications Satellite Corporation, Mimeo No. 0672 (Com. Car. Bur. released Nov. 8, 1985), *recon. den.*, FCC 86-394 (released Sept. 19, 1986).

[12] CTP offers satellite networks that address the demand for fairly high-speed data communications to dispersed locations employing VSATs. CICI offers International Business Services (IBS) and international television services to multinational organizations.

[13] STARS argued that the *Competitive Carrier* decisions, *see* notes 16 & 24 *infra*, which define relevant markets, are not controlling because they involve services, whereas the Contel ASC acquisitions involve vertical integration of manufacturing and services. STARS also stated that the domestic and international VSAT, video, and IBS markets are coalescing and cannot arbitrarily be isolated into domestic and international compartments. STARS claimed its conditions were justified because Contel ASC's acquisitions make it a dominant carrier.

[14] *COMSAT Order*, 2 FCC Rcd at 7205. The Bureau noted that *Competitive Carrier* determined that all domestic interexchange services are essentially fungible and that there is one single relevant product market and one single national geographic market with no relevant submarkets. Policies and Rules Concerning Rates and Facilities Authorizations for Common Carrier Services, Fourth Report and Order, 95 FCC 2d 554, 573-75 (1983).

[15] *COMSAT Order*, 2 FCC Rcd at 7205.

[16] *Id.* citing *International Competitive Carrier*, 102 FCC 2d 812, 828; *aff'd on recon.*, FCC 86-339 (Aug. 7, 1986).

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.* Contrary to STARS' assertions, the Bureau found that the noncompetition provision of the purchase agreement appeared to be a typical provision, effective for a limited period of time, and specifically confined to the business sold. *Id.* The Bureau concluded that although COMSAT would be unable to compete in these areas, Contel ASC would have no market power over other competitors. Thus, there was nothing in the provision that should stifle competition in the markets in which Contel ASC competes. *Id.*

[21] *Equatorial Order*, 2 FCC Rcd at 7298.

[22] *Id.*

[23] STARS proposed separate sets of conditions for the COMSAT/Contel ASC acquisition and for the Equatorial/Contel ASC acquisition. *See* the Appendix for a consolidation of STARS' conditions.

[24] Policies and Rules Concerning Rates and Facilities Authorizations for Competitive Carrier Services, First Report and Order, 85 FCC 2d 1 (1980), Second Report and Order, 91 FCC 2d 59 (1982), *recon. denied*, 93 FCC 2d 54 (1983), Third Report and Order, 48 Fed. Reg. 46,791 (Oct. 15, 1983), Fourth Report and Order, 95 FCC 2d 554 (1983), Fifth Report and Order, 98 FCC 2d 1191 (1984), *recon. denied*, FCC 851-572 (released Nov. 20, 1985), Sixth Report and Order, 50 Fed. Reg. 1215 (Jan. 10, 1985), *vacated on other grounds*, MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985).

[25] Competitive Carrier, Fourth Report and Order, 95 FCC 2d 554 (1983).

[26] Application at 17, quoting from *Authorized User II*, 90 FCC 2d 1394, 1407 (1982), citing Geller v. FCC, 610 F.2d 973 (D.C. Cir. 1979). It also quotes from Syracuse Peace Council, FCC 87-266 (Aug. 6, 1987), that the Commission will review past decisions to ensure consistency with current technology.

[27] STARS quotes from *Authorized User II* in which the Commission stated that it hoped that introducing COMSAT, an experienced and well financed carrier, to the international market would give COMSAT an incentive to keep satellite rates low and to introduce service innovations. *Authorized User II*, *supra* at 1405.

[28] As explained in note 3, *supra*, COMSAT's opposition responds only to the COMSAT/Contel ASC application granted in the *COMSAT Order*.

[29] In its reply, STARS claims that it "submitted *specific* verified evidence of Contel's anticompetitive conduct by means of an affidavit by STARS' Chief Executive Officer who had personal knowledge of the events which he swore took place." Reply at 2, n.1. This affidavit, however, merely states that the affiant had read STARS' petition for partial denial of the application in ENF-87-18 and that "the facts stated therein are true and correct to the best of my knowledge and belief . . . ." An affidavit supporting a party's pleading does not convert the unsupported conclusions contained in the pleading into verified evidence.

[30] Application at 17.

[31] *See, e.g.*, Communications Satellite Corporation, 90 FCC 2d 1159 (1982), *recon.*, 93 FCC 2d 701 (1983); Communications Satellite Corporation, 97 FCC 2d 145 (1984), *recon.*, 99 FCC 2d 1040 (1984); Communications Satellite Corporation, 50 Fed. Reg. 18304 (Apr. 30, 1985); *see* also Communications Satellite Corporation, FCC 86-178 (released Apr. 22, 1986) (COMSAT-CICI Earth Station Transfer Order).

[32] *See e.g., Snap-On Tools Corp. v. FTC*, 321 F.2d 825, 837 (7th Cir. 1963).

[33] The schedules were not submitted with the application. They were reviewed in conjunction with the Hart-Scott-Rodino materials. Since they were not part of the record, and did not contain anything which was decisionally significant, they did not form part of the basis for the decision.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BellSouth Plan for
Comparably Efficient Interconnection
for Voice Messaging Services

MEMORANDUM OPINION AND ORDER

Adopted: December 13, 1988; Released: December 23, 1988

By the Deputy Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On March 18, 1988, pursuant to the requirements of the *Computer III* proceeding,[1] BellSouth filed a Comparably Efficient Interconnection (CEI) plan (the plan) for the provision of voice messaging services (VMS). It filed an amendment to the plan (the amendment) on August 31, 1988.[2] In this Order, we approve the plan as amended, subject to the conditions discussed below. [3]

II. BACKGROUND

2. The *Phase I Order* required the BOCs to file Open Network Architecture (ONA) plans by February 1, 1988, that include an initial set of key Basic Service Elements (BSEs) that can be used in a wide variety of enhanced services. The Commission ruled that, until BOCs implement approved ONA plans, the BOCs may offer a specific enhanced service, or class of services, on an unseparated basis only after the Commission approves a plan that satisfies the Commission's CEI requirements, as well as other nonstructural safeguards governing the use of customer proprietary network information (CPNI), disclosure of network information, and nondiscrimination reporting.[4] Under CEI, carriers must provide interconnection opportunities to other enhanced service providers (ESPs) on the basis of an "equal access" standard to ensure that basic facilities are available to such ESPs on an unbundled and functionally equal basis.[5] We use this standard to review plan compliance with the CEI parameters concerning interface functionality, unbundling of basic services, resale, technical characteristics, installation, maintenance, and repair, end-user access, CEI availability, minimization of transport costs, and recipients of CEI.[6]

3. BellSouth filed its ONA plan on February 1, 1988, and an amendment to it on March 10, 1988.[7] BellSouth states that its CEI plan for VMS generally reflects the same approach to the unbundling of basic services and the unseparated offering of enhanced services that it described in its ONA plan.[8] On November 17, 1988, the Commission adopted the *BOC ONA Order*, which approved all of the BOCs' ONA plans in part, but required that the BOCs submit and the Commission approve a number of amendments before the structural separation requirements would be removed generally for any BOC's enhanced service operations.[9]

III. SERVICE DESCRIPTION

4. The Commission requires that carriers' CEI plans contain a "short general description of the enhanced service offered to notify [the Commission] of the utility and purposes of the CEI arrangements described in the plan.[10]

A. *Positions of the Parties*

5. BellSouth states that its voice messaging service will use voice store-and-forward machines that are currently available in the marketplace to all ESPs.[11] While it says that the specific features it will offer will depend on market needs and equipment vendor capabilities, it states that the service generally will include capabilities such as "voice message storage, review, reply, retrieval, redirect, broadcast, scan, delete, etc".[12] Subscribers will be able to arrange for messages directed to them to be stored electronically for later retrieval, with callers receiving a personalized greeting from the subscriber.[13]

6. ANPA and ATSI argue that BellSouth's descriptions of its proposed voice messaging services are impermissibly vague, making it impossible to determine whether or not BellSouth has structured its CEI offering so that it is uniquely advantageous to BellSouth's affiliated messaging operations.[14]

7. BellSouth argues that it has complied with the Commission's requirement to provide a "short general description of the enhanced service offered."[15] BellSouth contends that the purpose of the Commission's service description requirements is not to cause BOCs to divulge their product descriptions and marketing plans to competitors, but only to demonstrate the utility of the underlying basic service offering.[16]

B. *Discussion*

8. We agree with BellSouth that the Commission requires CEI plans to describe a BOC's enhanced service offerings in order to demonstrate the utility to competitors of the basic service offerings that will underlie a proposed enhanced service, as an assurance that a BOC will provide comparably efficient interconnection to such basic offerings for its enhanced service competitors. The enhanced service description is designed to help us understand what utility the basic services described by the BOC will have for its own, and potentially for others, enhanced services. BellSouth's concise description of its proposed service satisfies that purpose.[17]

IV. COMPLIANCE ISSUES

A. *CEI Requirements*

9. The Commission designed the CEI requirements to give enhanced service providers equal and efficient access to those basic services that AT&T and the BOCs would use in providing their own enhanced services. The *Phase I Reconsideration* emphasized that the standard for evaluating CEI compliance is based on "equal access" which will be interpreted in a "reasonable and efficiency-promoting manner.[18] As we have noted in other CEI orders, the standard does not require absolute technical equality, but rather seeks to achieve fairness and efficiency for all enhanced service providers competing with a carrier. Factors used to evaluate whether the standard has been met include the absence of systematic differences between basic service access provided to the carrier's enhanced ser-

vice operations and to others, end-user perception of equality, and utility to other enhanced service providers -- that is, whether any technical disparity makes a difference in the ability of competitors to provide their enhanced services.[19]

1. ***Proposed CEI Arrangements***

10. BellSouth states that its CEI plan reflects the same approach to the unbundling of basic services and unseparated offering of enhanced services that it described in its ONA plan. It will unbundle network capabilities that it will use to provide VMS and offer those capabilities to others within the framework proposed in its ONA plan, *i.e .*, as "Access Links," "Features/Functions," and "Transport/Usage."[20] BellSouth says that it will use basic network interfaces and capabilities to interconnect its VMS machines, and those of other ESPs, with the telephone network, and that it will provide signaling information to ESPs via dedicated private lines.[21] It says that most of these capabilities are not new, but are newly unbundled from existing services.[22] The plan indicates that BellSouth will offer ESPs either a single voice-grade channel or a larger capacity access link.[23] ESPs would have one switched transport/usage alternative available to them, under which usage would be measured and billed on both an originating and terminating basis for all ESPs.[24]

11. BellSouth proposes to provide several basic features and functions at its switching offices as part of CEI for its VMS offering, including call forwarding options; multiline hunt groups;[25] user transfer, which would permit a voice messaging provider to transfer an incoming call to a customer or to a third party; a Simplified Message Desk Interface (SMDI) option, which provides called and calling number information for calls that originate and terminate within the same wire center; message waiting indicator; and a new capability called the Surrogate Client Number Option (SCNO), which would provide a form of calling number identification when the ESP and its customer are served by different central offices.[26]

12. The plan proposes to restrict availability of the features and functions described above to customers who access the network through "ESP Access Links."[27] BellSouth indicates that ESPs will have one switched transport/usage alternative available to them under this CEI plan, with usage measured and billed on both an originating and terminating basis for all ESPs.[28] BellSouth's amendment does not change this representation, but clarifies that ESPs will also be able to retain their existing intrastate access arrangements.[29]

2. ***CEI Parameters***

13. The CEI parameters are designed to ensure that the basic services used by a BOC's enhanced service are available to other ESPs in an equally efficient manner. The Commission took care to develop the parameters so that the carriers subject to them could satisfy them in a flexible manner, consonant with the particular services at issue.[30] We discuss specific parameters below.[31]

a. ***Interface Functionality***

14. As part of its CEI offering, a BOC must provide standardized hardware and software interfaces that support transmission, switching, and signaling functions identical to those utilized in its own enhanced service offering with information and technical specifications for such interfaces subject to our network information disclosure requirements.[32]

(1) ***Positions of the Parties***

15. BellSouth asserts that it will make available to other enhanced service vendors standardized hardware and software interfaces that are able to support transmission, switching, and signaling functions identical to those used in its own enhanced service.[33] It says that the technical details of those interconnections are already available in existing tariffs.[34]

16. ANPA urges that we require BellSouth to identify which "transmission, switching, and signaling functions" its VMS operation will use so that competitors can determine which technical interfaces are identical to those that will be used by BellSouth.[35] BellSouth does not reply to, and in fact appears to have overlooked, the questions that ANPA raises concerning its compliance with this requirement. However, BellSouth asserts generally that, to the extent that ANPA is seeking confirmation that it will offer all underlying basic services to competing ESPs on the same terms and conditions, it has clearly articulated that commitment in the plan.[36]

(2) ***Discussion***

17. BellSouth's description of its CEI services emphasizes that all of the services, with the exception of SCNO, exist now or are unbundled versions of existing services. It is also apparent, from BellSouth's description in the plan, that SCNO will use existing hardware and software interfaces. Thus, the interfaces and technical functionality for these services should be available in existing tariffs, as BellSouth states. To the extent that the technical specifications of any existing services or unbundled versions of existing services change, BellSouth is subject to our network disclosure rules to provide the relevant technical information prior to the use of such services. Subject to that condition, we find BellSouth's explanation of its treatment of interface functionalilites to be sufficient.

b. Unbundling and Resale of Basic Services

18. To satisfy the CEI requirements, the basic services and basic service functions that underlie the carrier's enhanced service offering must be unbundled from other basic service offerings and associated with a specific rate element in the CEI tariff.[37] The *Phase I Order* requires a BOC's enhanced service operations to take the basic services used in its enhanced service offerings at their unbundled tariffed rates as a means of preventing improper cost-shifting to regulated operations and anticompetitive pricing in unregulated markets.[38]

(1) ***Positions of the Parties***

19. The plan states that BellSouth's VMS operation will take all basic network capabilities that it uses at tariffed rates.[39] BellSouth says that it will unbundle the network capabilities useful to voice messaging providers into elements that it describes as access links, features/functions, and transport/usage, consistent with the framework of the BOCs' common ONA model that BellSouth follows in its ONA plan.[40]

20. Commenters assert that BellSouth is proposing to impose use and customer restrictions, which require that customers subscribe to specially tariffed ESP access links and ESP transport/usage service to obtain the new central office features and functions described in the plan.[41]

21. Telenet characterizes BellSouth's proposal to offer its SCNO functionality only in the context of a CEI plan as an abuse of the ONA process.[42] Telenet charges that BellSouth's decision to propose the SCNO in a CEI plan rather than in its ONA plan, which BellSouth filed six weeks earlier than its CEI plan, is an attempt to limit the availability of the SCNO. Telenet sees BellSouth's SCNO proposal as further evidence that the BOCs "have not been forthcoming in their ONA Plans, and that their networks possess far more functionality of utility to ESPs than their ONA Plans have revealed.[43] On this basis Telenet argues that the Commission should treat BellSouth's handling of SCNO as another reason to defer processing of pending or additional CEI requests until the BOCs have amended their ONA plans to meet a "minimum threshold of compliance.[44] Telenet urges us to make clear that any new network functionality offered in a CEI plan must concurrently be offered as an ONA BSE.[45]

22. The BellSouth reply argues that, for purposes of a CEI plan, it is required only to unbundle and make available to other enhanced service providers the same basic services that it will use in its own enhanced service offering, under the same tariffs and on a functionally equal basis.[46] BellSouth states that its enhanced service operation will order basic services from the same tariff and will take those tariffed services on the same terms and conditions as all other ESPs. BellSouth also argues that its plan reflects a greater degree of unbundling than any other CEI plan already approved by the Commission, emphasizing that its plan is "functionally rich with unbundled capabilities".[47] As examples, BellSouth cites the choices it is proposing to offer ESPs for distance-sensitive access links, concentration options, and "numerous" call forwarding features.[48]

23. BellSouth characterizes its SCNO offering as a praiseworthy example of unbundling and rejects Telenet's attack on SCNO as "convoluted."[49] In BellSouth's view, the development of SCNO represents not an abuse of process but the potential success of the CEI/ONA process: only during the late development stages of its own VMS CEI plan did it recognize the need for and develop SCNO, claims BellSouth.[50] Moreover, "[f]rom the time the [BellSouth] Companies developed SCNO, they intended to include SCNO as a new BSE" in the BellSouth ONA plan, and they will file an amendment to effectuate that intent.[51]

(2) *Discussion*

24. BellSouth has complied with the requirement that it unbundle the basic services to be used by its VMS service from other basic services. From a functional standpoint, it is offering to others the same basic services that it will provide to its own enhanced service operation for use with VMS. We address the terms and conditions that BellSouth attaches to those offerings in Section IV(A)(2)(i) below.

25. We commend BellSouth's technical creativity in developing the SCNO feature as a means of providing a form of calling number identification and "line-side" interconnections using current network technology, and we welcome the amendment it has filed to its ONA plan incorporating SCNO into its list of initial BSEs.[52] We approve this part of its CEI plan.

c. *Technical Characteristics*

26. The *Phase I Order* requires that, as part of its CEI offering to enhanced service competitors, a BOC must offer basic services with technical characteristics that are equal to those of the basic services it utilizes for its own enhanced services. These characteristics include, but are not limited to: transmission parameters, such as bandwidth and bit rates; quality, such as bit error rate and delay distortions; and reliability, such as mean time between failures.[53]

(1) *Positions of the Parties*

27. BellSouth asserts that the technical characteristics of the basic services that it supplies to enhanced services owned by itself and others will be equal.[54] It concedes that non-collocated enhanced service providers using analog lines will experience some signal attenuation. However, BellSouth claims that the store-and-forward machines commonly available on the market today can compensate for the limited degree of attenuation involved by increasing their output levels.[55]

28. ANPA says that BellSouth has merely asserted that technical characteristics will be equal for its own and others' enhanced service operations. It claims that BellSouth's compliance with this requirement cannot be determined unless the Commission requires BellSouth to provide sufficient descriptions of its unbundling and interface functions, as well as adequate reporting.[56]

(2) *Discussion*

29. We have approved BellSouth's unbundling proposal and conditionally approve its descriptions of the interface functionalities that its CEI services will use. The *BOC ONA Order* requires all of the BOCs, including BellSouth, to amend their ONA plans to provide a list of documents containing interface information and technical characteristics.[57] We require BellSouth to incorporate that list into its CEI plan at the same time that it amends its ONA plan. The information provided in these parts of BellSouth's CEI plan is adequate for the interim period before BellSouth amends its ONA plan. BellSouth's description of interface functionalities in its CEI plan is fully consistent with its representation that the technical characteristics of the CEI services that BellSouth offers to its own enhanced services operations and to other ESPs will be equal. No party provides any basis for rejecting this explicit "equal access" undertaking by BellSouth. Accordingly, we approve this part of the plan.

d. *CEI Availability*

30. A carrier's CEI offering must be fully operational and available on the date that it offers its corresponding enhanced service to the public. In addition, the carrier must specify a reasonable time prior to this date during which prospective users of CEI, such as enhanced service competitors, can utilize the CEI facilities and services for purposes of testing their enhanced service offerings.[58]

(1) *Positions of the Parties*

31. BellSouth asserts that it will make its CEI offerings available in the same locations and on the same dates for other enhanced service vendors as for its own enhanced

services.[59] It states that the technical availability of terminating recording capabilities restricts the availability of enhanced voice services to 1AESS central office switches equipped with a version of generic software called "1AE9" or a later generic.[60] It says that it will consider deploying similar capabilities to other kinds of switches when those capabilities become available and that, until then, voice messaging services can be provided to customers via dedicated connections to a remote central office (presumably one equipped with a 1AESS switch) or through use of the SCNO capability.[61]

32. ANPA argues that it does not suffice for BellSouth merely to state that it will make CEI offerings available to other ESPs in the same locations and on the same dates as for itself.[62] Because CEI offerings are likely to be "made quickly," it says, BellSouth's plan should identify CEI availability more specifically, *i. e.*, it should identify the major calling areas in which it expects early implementation.[63]

33. In its reply comments BellSouth argues that the plan makes the necessary commitment to offer CEI in the same locations and on the same dates for other ESPs as for its affiliated enhanced service operations.[64] However, BellSouth also provides additional deployment information: it plans to "trial" its VMS offering initially in West Palm Beach and to extend the service to other locations in South Florida and Atlanta shortly therafter.[65] BellSouth says that Memphis, Birmingham, and Nashville have also been identified as candidates for subsequent early deployment of the company's VMS.[66] For other areas, BellSouth asserts that it will comply with the Commission's advance testing requirement. [67]

(2) ***Discussion***

34. BellSouth has disclosed generally the geographic areas in which it contemplates providing VMS service and the basic services that underlie it.[68] However, we require BellSouth to provide, by January 18, 1988, an updated list of the areas in which it plans to deploy VMS and the dates by which the corresponding CEI services will be available. Subject to these conditions, we approve this part of the plan.[69]

e. ***Minimization of Transmission Costs***

35. The *Phase I Order* recognized that carriers may reduce or eliminate certain equipment and transmission costs by collocating or integrating enhanced services facilities with their basic network facilities. While the Commission did not impose mandatory collocation requirements on carriers subject to CEI, it did require such carriers to provide others with interconnection facilities that minimize such transmission costs. It required that carriers demonstrate in their CEI plans what steps they would take to reduce transmission costs for competitors. It further directed such carriers to develop techniques to minimize such costs.[70] The *Phase I Reconsideration* clarified that this requirement focuses on technological methods of reducing transmission costs, and does not require a CEI offering that is substantially identical to existing services to be priced lower than those services simply for CEI purposes. Instead, it encourages the use of existing basic services in CEI in order to expedite initial CEI development.[71] In the *Phase II Reconsideration* the Commission clarified that a carrier may satisfy this CEI requirement if it charges itself an access link rate that is the same as that paid by non-collocated enhanced service providers, provided that the access connections in each case are equivalent in technical quality.[72]

(1) ***Positions of the Parties***

(a) ***The Plan***

36. BellSouth asserts that, "in order to expedite approval of this CEI Plan," it will charge its own voice messaging service the same tariffed rates, including the rate for the access link, as it charges other enhanced service providers.[73] The illustrative tariff attached to the plan indicates that there will be two rates applied for single voice-grade channel access links, one for "greater than 0, up to X miles," and the other for "X miles or greater".[74] For high-capacity links, the illustrative tariff indicates that one price will be charged for the first half mile and another, potentially different, price charged for incremental half miles.[75] On the basis of these proposed tariff structures, BellSouth asserts that differences in transmission costs for collocated and noncollocated enhanced services "do not exist".[76] It likens its pricing structure to the equalized access prices offered by Pacific Bell and Bell Atlantic in their recently-approved CEI plans.[77]

37. BellSouth also states that it will provide multiplexing services, which it describes as DS1/Analog or DS0 multiplexing, that will enable customers to concentrate multiple, individual voice-grade circuits into a single high capacity digital circuit, which it terms a DS1.[78] It says that it will make DS1 links available at prices that are based on half- mile increments.[79] BellSouth states that its multiplexing services will be "average priced" and will cover both the multiplexer equipment and cabling to the respective interconnection frames on each side of the multiplexer.[80]

(b) ***Comments***

38. Commenters express concern that BellSouth will establish a rate structure for access links that will give a significant price advantage to BellSouth's collocated enhanced service operations. ANPA argues that, because BellSouth has not indicated where it will draw the mileage lines between the two rate bands it proposes for its voice-grade access links, it is impossible to determine whether or not its proposed rate structure will be discriminatory.[81] CONAP draws a more pessimistic inference that BellSouth's ONA plan "makes clear that the shortest mileage band, 0.1 miles or less, will effectively be available only to BellSouth's [collocated] enhanced service operations."[82] Florida states that it plans to examine the mileage bands that BellSouth will offer for voice-grade channel links, expressing the view that mileage bands for pricing this element may be an effective mechanism for achieving transport cost parity between BellSouth's enhanced service operation and its competitors.[83]

39. Telenet charges not only that BellSouth "conceals" the dividing line between its mileage rate bands, but that its proposal is a "cynical device" to secure quick access to the voice messaging marketplace.[84] BellSouth's ONA plan proposes to maximize that company's collocation price advantage by setting the first rate band at zero miles, says Telenet, and BellSouth's CEI plan makes clear that BellSouth intends to move away from price parity as soon as it can.[85] Telenet claims that BellSouth's rate proposals differ from the comparable proposals of Bell Atlantic and

Pactel, which the Commission approved, and urges us to require BellSouth to conform its plan to the Bell Atlantic and Pactel plans.[86]

40. The BellSouth reply asserts that BellSouth has complied with the Commission's assertion in the *Pacific CEI Order* that the minimization of transport costs CEI parameter is automatically satisfied if a carrier charges itself the same tariffed rate for its access facility as it charges all other enhanced service providers.[87] BellSouth construes Telenet's comments as arguing that BellSouth's offer to forego any collocation pricing advantage in its CEI plan should be rejected on the ground that BellSouth has declined to forego pricing parity in its ONA plan. That issue, says BellSouth, should be resolved by the Commission in the ONA proceeding.[88]

(c) *BellSouth Amendment*

41. BellSouth amended its plan to eliminate the two distance-sensitive rate bands that it proposed in the plan for the single voice-grade channel access link between the VMS provider's location and the serving wire center.[89] Thus, says BellSouth, it will charge its collocated ESP exactly the same tariffed rates for voice-grade access links that it will charge other ESPs for the same service.[90] BellSouth states that it will continue to make the DS1 channel access link available under existing tariffs.[91]

(2) *Discussion*

42. By eliminating the distance-sensitive rate bands that it originally had proposed for single voice-grade access links, BellSouth has satisfied the minimization of transmission costs requirement for that service, because it will charge its own, collocated ESPs the same price that it charges to others. However, BellSouth has not clearly offered to provide price parity for DS1 access links, nor has it indicated that it will take other steps, in lieu of price parity, to minimize transmission costs for non-collocated ESPs for this form of access. BellSouth proposes to charge distance-sensitive rates, based on half-mile increments, for DS1 service. The sample tariff attached to the plan does not exclude the possibility that BellSouth could apply a very low charge to ESPs within the first half-mile, with much higher incremental charges for ESPs located outside the half-mile radius. Since competing ESPs might have difficulty obtaining space for their facilities within a half-mile of BellSouth central offices, the competing ESPs might be unable to achieve price parity with BellSouth. The *BOC ONA Order* addresses this kind of problem by holding that the price parity requirement for distance-sensitive transmission services will be satisfied when a BOC charges its enhanced service operations served by a particular central office no less than the BOC would charge an ESP located two miles from that central office.[92]

43. It appears that BellSouth intends generally to satisfy the minimization of transmission costs parameter for this CEI plan by adopting a price parity approach. Accordingly, consistent with the *BOC ONA Order*, we approve this section of the plan, conditional upon BellSouth's charging its collocated, enhanced operations for all forms of access service priced on a distance-sensitive basis the rate that would apply to a noncollocated, unaffiliated ESP located two miles from the BellSouth central office. If BellSouth accepts this condition, it must notify us that it is doing so within 21 days of the release of this order. Alternatively, BellSouth must defer collocating its VMS operations until it has demonstrated by other means that it has satisfied the minimization of transport costs requirment.

f. *Recipients of CEI*

44. The *Phase I Order* stated that carriers should not restrict the availability of CEI to any particular class of customer or carriers that include enhanced service competitor.[93] The *Phase I Reconsideration* clarified that customer or use restrictions for state-tariffed basic services, provide an explanation of, and justification for, any such state-tariffed restrictions in their CEI plans.[94]

(1) *Positions of the Parties*

(a) *The Plan*

45. The plan states that BellSouth will require all ESPs to obtain service from a separate state tariff section containing offerings designed exclusively for ESP use.[95] A sample tariff attached to the plan makes clear that this restriction would apply whether or not an ESP seeks to use any of BellSouth's newly offered CEI services, *i. e.*, even if the ESP wanted to continue using connections customarily provided as business local exchange service.[96] The converse would also apply: BellSouth would preclude non- ESPs from obtaining services from BellSouth's ESP tariff sections.[97] The plan justifies these restrictions as being necessary to prevent tariff shopping by customers who perceive that similar services are being made available at different prices to different user groups.[98] The plan does not reveal what rates would apply to ESPs, but BellSouth provides a sample tariff indicating that ESPs would be charged per-minute fees for calls terminated as well as calls originated.[99] BellSouth does not claim that its intrastate rates are cost-based, stating instead that the rates it applies to regulated services are generally dependent on several factors, including market demand, willingness-to-pay studies, and revenue requirements.[100]

46. BellSouth states that it views user restrictions as a short- term solution to the problems of tariff shopping and revenue loss. BellSouth says it believes that "proper pricing of all services relative to one another, and their value to the user, is the only viable long term solution to this problem".[101] BellSouth does not define a "proper" pricing methodology.

(b) *Comments*

47. Commenters mount a two-pronged attack on the use restrictions in BellSouth's proposed ESP tariff. First, the commenters charge that the particular restrictions proposed by BellSouth would force ESPs to take access from a new tariff that would be unreasonably discriminatory. ESPs also claim that the new tariff would disrupt the enhanced service industry, which has come to rely on existing services and rate structures.[102] Second, commenters challenge BellSouth's decision to restrict its new tariff to ESPs, arguing that to the extent new services or new rates for features are available in that tariff, all users should be able to take them.[103]

48. ALC notes that the CEI tariffs proposed by BellSouth explicitly deny ESPs the use of those central office CEI offerings with any basic services other than those contained in the special state ESP tariff.[104] ALC claims that BellSouth does not provide sufficient justification for those restrictions, and it asserts that there are no technical

impediments that would prevent BellSouth from combining its new service features with other kinds of access links.[105] ALC argues that such use restrictions will disadvantage small to medium-sized ESPs that rely on interexchange carriers to reach customers outside of the local access transport areas (LATAs) where their equipment is located.[106] Those restrictions will have the indirect anticompetitive effect of insulating BellSouth's enhanced service operations from potential competition that could otherwise be provided by distant enhanced service providers, says ALC.[107]

49. ANPA asserts that BellSouth's proposed use restrictions violate the *Phase I Order* requirement that CEI be available to all end users on an equal basis.[108]

50. ATSI argues that BellSouth's proposed customer and use restrictions are blatantly discriminatory.[109] It cites the Commission's finding that such restrictions result in "cross-subsidization, price discrimination, and market segmentation" and "impair competition and reduce consumer welfare".[110] ATSI argues that BellSouth seeks to "shake up" the market for voice message services, just as it is entering the market, by forcing up the prices of existing service suppliers who have long relied on the availability of service at regular local business line rates.[111] The result will be to disrupt long-time relationships, causing customers to begin looking for alternative suppliers.[112] This disruption, ATSI argues, will benefit BellSouth even if BellSouth's enhanced service operation is required to pay the same rates as established competitors.[113]

51. AT&T argues that BellSouth has provided no substantiation for its assertions that tariff shopping could adversely affect general ratepayers. AT&T claims that BellSouth has conceded that cost-based pricing is the only permanent solution to tariff shopping.[114] Similarly, MCI contends that BellSouth's purported justification for user restrictions is based solely on unsubstantiated and overly general assumptions.[115] MCI says that none of the other BOCs that have filed CEI plans has sought to impose similar restrictions.[116] Moreover, says MCI, because these restrictions appear in a proposed tariff that BellSouth has prepared but not yet filed, it is clear that BellSouth, rather than state regulatory authorities, has taken the initiative to impose restrictions that the Commission has found to be anticompetitive.[117]

52. Florida states that, ultimately, it may be desirable for all users to pay the same amount for similar usage.[118] While it states that applying originating and terminating usage charges to access lines may result in an equitable recovery of required revenues, Florida emphasizes that it does not necessarily endorse the application of rates to enhanced service providers that differ from the rates applied to other users.[119]

53. IIA says that the use and customer restrictions that BellSouth proposes will have serious anticompetitive effects,[120] and that BellSouth should be required to provide detailed explanations and justifications for such restrictions.[121] In particular, IIA asserts that BellSouth has thus far failed to provide an adequate justification for imposing usage-sensitive pricing on ESPs without imposing such pricing on other customers.[122]

54. Telenet says that, if the Commission acquiesces in BellSouth's proposed use restrictions, it "will have effectively abdicated any ability it might have to ensure that BellSouth's entry into the enhanced services market is pro-competitive.[123] In a similar vein, Trintex argues that BellSouth's "web of eligibility and use restrictions frustrates the Commission's *Computer III* goals by inhibiting the innovative and efficient use of the network by ESPs."[124] Trintex states that, while the Commission crafted a narrow exception to allow states to impose customer or use restrictions so long as those restrictions did not limit the availability of BSEs to ESPs, it has never authorized the BOCs to create customer or use restrictions on their own initiative.[125] It says that its planned enhanced service is designed to make use of "plain old telephone service" (POTS), and it does not want a BOC to substitute its conception of the kinds of services or facilities that it should use.[126]

(c) ***BellSouth Reply***

55. BellSouth says that the Commission has previously recognized that ESPs constitute a reasonable classification of customers for purposes of applying, or not applying, particular rates to that class.[127] Moreover, says BellSouth, it has satisfied the Commission's requirement that it provide an explanation and justification for customer and use restrictions contained in intrastate tariffs.[128] It claims to have quantified the potential revenue loss that would result from unrestricted tariff shopping, which it says could be a "staggering" amount in the range of 1.5 to 4.1 billion per year, and it attaches tables of anticipated revenue effects on specific services.[129] BellSouth says that it is proposing use restrictions not for the purpose of discriminating against ESPs, but for the purpose of instituting tariff rates favorable to the development of the enhanced service industry while taking reasonable measures to protect general ratepayers from the burden of a major revenue shortfall.[130]

56. In support of these assertions, BellSouth lists hypothetical prices that it might charge ESPs for various services, and compares those prices with the prices it would charge other customers for the same or similar services. The hypothetical prices reflect the fact that BellSouth would deny ESPs use of traditional, flat-rated business lines for basic network access, substituting equivalent services that incorporate per-minute charges for call termination. However, BellSouth also proposes to charge ESPs substantially lower incremental prices than other customers would pay for central-office- based CEI services like call forwarding, distinctive ringing, and user transfer"[131] Thus, with higher priced access and lower priced features, BellSouth claims that its proposed new tariffs will (a) be more cost-based than those for existing services, and (b) provide many ESPs with lower rates than those available under existing tariffs.[132]

(d) ***BellSouth Amendment***

57. BellSouth amended its CEI plan to provide that ESPs that want to continue using existing state-tariffed access arrangements and other basic services may continue to do so at the same prices and subject to the same terms and conditions as are applied to other customers[133] BellSouth states, however, that it reserves "the right" to amend its CEI plan in the future to include any applicable state tariff use restrictions that might be adopted and approved by any state commission.[134] The amendment also provides that all end users will be able to take services from the new "ESP" tariff.[135] BellSouth would still include usage-sensitive charges in its new tariff and would require customers to take access from this tariff, instead of subscribing to flat-rated business lines, for intra-

state access arrangements, to qualify for the low incremental charges it originally proposed for central-office-based services like call forwarding and hunting.[136]

(e) *Comments on Amendment*

58. AT&T states that the amendment appears to eliminate the impermissible customer and use restrictions contained in the plan.[137] Three parties, however, construe the amendment as proposing only a temporary lifting of the use restrictions proposed in the plan. MCI argues that, to dissuade BellSouth from actively seeking to reimpose use restrictions of the kind proposed in the plan, we should express our intention to retain structural safeguards for the provision of BellSouth's voice messaging services if that company applies such restrictions in the future.[138] Telenet argues that BellSouth has openly admitted that its amendment is a mere expedient to gain approval of its plan, and that BellSouth has failed to manifest any enduring allegiance to the Commission's pro-competitive policies.[139] On that basis it argues that the plan, even as amended, should be rejected.[140] Tymnet contends that the amendment does not resolve the use restrictions issue, but puts the Commission on notice that BellSouth intends merely to postpone the time at which the Commission will be asked to resolve that issue.[141]

59. Both Telenet and Tymnet also attack BellSouth's requirement that, in order to obtain any of the new network capabilities offered by BellSouth, customers must subscribe to a new BellSouth access arrangement that applies two-way measured transmission charges.[142]

(2) *Discussion*

60. BellSouth's retraction, in its amendment, of its proposed use restrictions is consistent with the Commission's announced actions on this issue in the *BOC ONA Order*".[143] The BellSouth amendment retracts the proposed use restriction and allows VMS providers and other ESPs to continue subscribing to business exchange service and other state-tariffed basic services if they wish.[144] BellSouth will also open up its new "ESP tariff" and make it available to all local exchange customers. While BellSouth will make its re-priced features available only in conjunction with its re-priced access links in its new tariff, the Commission approved similar requirements in the *BOC ONA Order* in rejecting the notion that a linkage between BSAs and BSEs is a form of impermissible use restriction.[145] Accordingly, we approve this aspect of the plan as amended.

3. *Jurisdiction*

a. *Positions of the Parties*

(1) *Comments*

61. Six parties contend that BellSouth should be required to file federal tariffs as well as state tariffs for the basic services underlying its enhanced service offerings.[146] ADAPSO argues that BellSouth's proposal to file tariffs for new CEI/ONA offerings solely with the states derogates from the Commission's jurisdiction.[147] ALC charges that BellSouth's proposed basic access tariffs are improper because the services will only be offered within state tariffs even though ESPs will use the services to complete both interstate and intrastate calls.[148] For example, ALC points out that many interstate telephone calls will be terminated to the voice messaging services of both BellSouth and its competitors.[149] When access facilities are employed for terminating interstate calls to the voice messaging services, it says, the access employed will be interstate and should be tariffed federally.[150]

62. AT&T argues that interstate interexchange transport of signals and other information associated with BOC BSEs will be essential for the efficient operation of ONA on a national scale.[151]

63. MCI argues that BellSouth has violated fundamental jurisdictional principles by failing to recognize that voice messaging services will develop on an as well as interstate basis.[152] Accordingly, it argues, BellSouth should be required to include the relevant basic services in interstate tariffs, just as local exchange carriers today file intrastate and interstate tariffs for exchange access services for ordinary long distance service.[153]

64. Telenet says that BellSouth is unique among the BOCs in its ONA plan proposal to file no federal tariffs covering its BSAs or BSEs.[154] It sees BellSouth's intent to file only state tariffs as part of a strategy to apply market-based rates, rather than cost-based rates for ONA services, and to enforce those rates through use restrictions of a kind that are not permitted in federal tariffs.[155] Telenet cites a number of precedents that it says establish the Commission's jurisdiction over services used in the provision of interstate services.[156] ATSI makes similar arguments.[157]

65. Florida opposes the views of other commenters on this issue, asserting that regulatory responsibility for the implementation of voice messaging service lies with state commissions because VMS is a local service.[158]

(2) *BellSouth Reply*

66. The BellSouth reply claims that the Commission has never indicated that CEI services must be tariffed at the federal level as well as the state level.[159] BellSouth compares its proposed tariff filings to those submitted by Pacific Bell in connection with its CEI plan for voice messaging. It construes the *Pacific CEI Order* as ruling that CEI requirements are designed only to ensure that the access utilized by the enhanced service operations of a BOC are equivalent to those provided to other enhanced service providers.[160] BellSouth also cites the *Pacific CEI Order* as noting that it does not appear that VMS providers will be unable to obtain whatever types of interstate access VMS providers need to offer interstate services.[161]

(3) *Comments on Amendment*

67. AT&T, Telenet, and Tymnet note that the amendment does not propose to file any federal tariffs for BSAs or BSEs; they reiterate their arguments that BellSouth should be required to file federal tariffs for those services.[162]

b. *Discussion*

68. The *BOC ONA Order* approves the provision of intrastate ONA services on the basis of state tariffs, but it also requires the BOCs to establish federally tariffed BSAs and BSEs.[163] Those interstate tariffs will be subject to review for compliance with full federal tariffing principles.[164] Because the Commission's existing Part 69 rules for access tariffs must be modified to implement this requirement, the Commission announced its intention to initiate a separate Rule Making to amend Part 69.[165] Until

Part 69 is amended, the BOCs may implement their CEI plans by filing CEI/ONA service tariffs at the state level. BOCs will not be required to file interstate tariffs for such services during this interim period, although BOCs who desire to file interstate CEI/ONA tariffs may seek appropriate waivers of Part 69 rules to do so.[166] We approve this aspect of BellSouth's CEI plan on an interim basis, while placing it on notice that it may be required to file additional federal tariffs when the Commission completes its Part 69 Rule Making.[167]

4. ***CEI Pricing***

69. The *Phase I Order* established a set of pricing requirements for CEI that require carriers to include an averaged Basic Interconnection Charge and an averaged Basic Concentration Charge in their CEI tariffs and permit, but do not require, charges for transmission services to be distance- sensitive, rather than averaged.[168] That order also stated that standard tariffed rates should apply to preexisting, conventional network services that ESPs may use in conjunction with certain offerings. The *Phase I Reconsideration* expressly declined to alter this CEI pricing framework, and stated that a CEI service offering that is substantially identical to an existing service need not be priced lower than that service simply for CEI purposes.[169] The Commission held that the use of existing basic services as components of CEI was not only permissible, but encouraged, as a means of expediting initial CEI deployment. The Commission emphasized that it was not preempting the states from establishing rates or general terms, conditions, or methods of regulation for particular intrastate CEI offerings or BSEs. However, it held that, if a state imposes terms or conditions on a carrier's intrastate CEI offerings or BSEs that are inconsistent with the CEI pricing requirements, the carrier must obtain a waiver of those requirements before it introduces an enhanced service that makes use of the basic services at issue.[170]

a. ***Positions of the Parties***

(1) ***The Plan***

70. BellSouth states that the proposed distance-sensitive charges for access links reflects its philosophy that users of the basic network capabilities provided under CEI/ONA should pay the costs of those services.[171] It states that its own and other enhanced service providers will be required to use the same tariffed interconnection "from the frame appearance of the ESP access link to the circuit switched network."[172] BellSouth states that it will average the prices that it charges for these interconnections and that the resulting rate element "will apply to all ESP voice messaging connections to the circuit switched network."[173] BellSouth also asserts that its basic concentration charges will be average-priced.[174]

(2) ***Comments***

71. Commenters charge that BellSouth proposes to apply a "value of service" or "strategic" pricing philosophy, rather than setting rates that reflect the cost of providing service, in ways that will enable BellSouth to discourage competition.[175] One commenter argues that BellSouth has not made clear how or whether it will apply the basic concentration charge to its own enhanced operations.[176]

72. BellSouth replies that the pricing structure proposed in the plan could result in lower charges to some ESPs and would produce only slight rate increases for others.[177] In any event, it argues, commenters' attacks on "strategic pricing" are misplaced in the context of intrastate rates, because there "is no such concept for the FCC to apply in evaluating state rates."[178]

b. ***Discussion***

73. In Section IV(A)(2)(h) above, we generally approve BellSouth's amendment to the extent that it proposes to provide pricing parity for voice- grade access links, and we describe the conditions that BellSouth must satisfy to conform to the Commission's definition of pricing parity for its DS1 access links. Under those conditions, BellSouth's pricing will satisfy our CEI nondiscrimination requirements. As the Commission held in the *Phase II Reconsideration*, the provision of pricing parity by a BOC also satisfies the price-averaging requirements for the basic concentration charge.[179]

74. We agree with BellSouth that objections to specific rates for intrastate tariffed basic services are not a matter for review in this CEI proceeding. BellSouth's plan, as amended, satisfies our narrow CEI pricing requirements as applied to such services. Furthermore, all the basic services that BellSouth will use to offer VMS will be available to all ESPs and end users through generally applicable tariffs. Thus, all ESPs -- both BellSouth's and its competitors -- will have access to the exact same set of basic services at the same rates and on the same terms and conditions. Accordingly, we approve this part of BellSouth's plan.[180]

5. ***Other Nonstructural Safeguards***

a. ***Customer Proprietary Network Information***

75. The *Phase II Order* adopted CPNI requirements for the enhanced services operations of AT&T and the BOCs that require those carriers to (1) make CPNI available, upon customer request, to unaffiliated enhanced service vendors on the same terms and conditions that are available to their own enhanced services personnel; (2) limit their enhanced services personnel from accessing a customer's CPNI, if the customer so requests; and (3) notify multiline business customers annually of their CPNI rights. That order also requires the BOCs to provide to unaffiliated enhanced service vendors any nonproprietary, aggregate CPNI that the BOCs provide to their own enhanced services personnel. This information must be provided to unaffiliated vendors on the same terms and conditions that are available to the BOCs' own enhanced service operations.[181]

76. The *Phase II Reconsideration* declined to require that the BOCs' enhanced service personnel be denied access to CPNI absent prior authorization from customers. The Commission required the BOCs to amend their ONA plans by March 10, 1988, to describe the types of information that BOCs will treat as CPNI. In their ONA plan amendments, the BOCs were to describe, among other things, the CPNI of various types of ESPs that they plan to restrict pursuant to requests for confidentiality from those providers. The *Phase II Reconsideration* also adopted several requirements to increase customers' ability to limit access to their CPNI. First, each CPNI notice from a BOC to its multiline business customers must include a re-

sponse form that customers may use to inform the carrier of their preferred CPNI treatment. Second, the BOCs must treat a customer's choice to restrict release of its CPNI as effective until the customer specifically chooses otherwise. Third, customers may restrict BOC access to some or all of their CPNI for specific time periods or for specific purposes. Fourth, the BOCs must honor customer requests for restricted treatment of CPNI that are sent before the carriers send notices of CPNI rights. Fifth, the BOCs must include copies of their proposed notification of CPNI rights and response forms with their ONA plans. The Commission delegated authority to the Bureau to review these materials to ensure that customers receive a fair and complete notice of their CPNI rights and options.

(1) ***Positions of the Parties***

77. BellSouth states that its procedures for meeting the CPNI safeguards are described in its ONA plan, and it attaches that portion of its ONA plan as Appendix C.[182]

78. ANPA argues that BellSouth has failed to describe the type of CPNI that BellSouth will restrict upon request.[183] ANPA also sees "severe anticompetitive risks" in what it describes as BellSouth's plan "to have its enhanced services personnel contact those customers who have made a blanket denial of authorization, purportedly to 'clarify' the cut-off decision and seek modified authorization."[184] ANPA says that restrictions should be placed on these "clarification" efforts but that, if such actions are permitted, BellSouth's enhanced service competitors should receive simultaneous notice and opportunity to seek release of the CPNI.[185] ANPA argues that BellSouth has failed to describe the minimum types of information that it will make available to other ESPs, the time periods within which BellSouth would release such information or provide notice of its availability, or the terms and conditions under which BellSouth would make the information available.[186]

79. ATSI says that BellSouth's CPNI proposals are flawed in three ways.[187] First, ATSI claims that BellSouth has proposed a vague and overbroad definition of CPNI.[188] It charges that BellSouth could use an overly expansive definition of CPNI as a means of denying its competitors access to information, such as traffic studies and compilations of usage data, whose continued confidentiality will serve merely to facilitate the BOCs efforts to "steal" customers away from existing service suppliers.[189] ATSI also argues that, by always attributing ownership of CPNI to the billed party, BellSouth will misclassify information that properly belongs to ESPs.[190] For example, it says, the call forwarding information of a voice messaging customer can readily be used to identify the VMS provider, even though BellSouth would attribute ownership of such information to the end user.[191] Finally, ATSI argues that BellSouth's proposed procedures for restricting the access of BellSouth personnel do not provide adequate security against unauthorized access. [192]

80. Telenet says that the Commission's "asymmetrical" treatment of CPNI is inconsistent with a revision to the MFJ contained in the *March 7 Order* and argues that the Commission must now revise its CPNI rules to make those rules nondiscriminatory. [193] Telenet also challenges BellSouth's proposal to seek "clarification" from customers who seek to restrict BOC access to their CPNI, arguing that "this 'clarification' process is really a euphemism for an opportunity to market BellSouth's enhanced services to a customer sophisticated enough to seek protection of his CPNI, and to determine his interest in enhanced services in the guise of 'clarifying' the scope of his privacy claim." [194] Telenet claims that none of the other BOCs has found it necessary to adopt such a clarification procedure. [195]

81. In answer to the arguments of parties that contend that its definition of CPNI is vague, underinclusive, or overinclusive, BellSouth says that no party has offered a simpler or more straightforward definition but that, nonetheless, it has recently modified its CPNI definition, in the context of the *BOC CPE Relief* proceeding, to include "how much you use [basic services] and your billing records." [196] BellSouth states its intention to file amended notification and response forms to conform those forms to its modifications in the CPE proceeding. [197] BellSouth defends, as a pragmatic and practical approach, its proposal to identify the ownership of CPNI on the basis of billing records. [198] This solution puts control of the CPNI in the hands of the party who is paying for the services, argues BellSouth, and it asserts that ATSI has offered no better solution. [199]

82. BellSouth does not directly address ATSI's concerns about the adequacy of its CPNI security measures, except that BellSouth contends generally that opposing commenters are really attacking the Commission's CPNI requirements rather than addressing the extent of BellSouth's compliance with those requirements. [200]

83. BellSouth claims that its plans to contact customers to clarify the scope of their CPNI requests have already been approved in the *BOC CPE Plans Order*. [201] Moreover, it argues, no matter how simple and straightforward its notification and response forms may be, some customers are bound to submit ambiguous responses regarding CPNI restrictions. [202] BellSouth also notes that the Commission has not prohibited BOC enhanced service personnel from contacting customers that restrict their CPNI; BOCs remain free to try to sell their products and services to those customers, it says, as long as the BOC does not use or access the prohibited CPNI. [203] As part of those sales efforts, argues BellSouth, its enhanced service personnel may legitimately request the customer to permit disclosure of CPNI to them, just as any other vendor may do. [204]

(2) ***BellSouth Amendment***

84. In the amendment, BellSouth notes that, since it filed the plan, it has modified its proposed treatment of CPNI to conform to Commission requirements for CPNI used in conjunction with the sale and marketing of customer premises equipment (CPE). [205] The amendment incorporates those modifications. [206]

b ***Discussion***

85. We approve this part of BellSouth's plan, subject to the following conditions. First, the *BOC ONA Order* discusses in detail a number of CPNI issues raised in this proceeding, including the kinds of information that the BOCs should treat as CPNILT[207] and the procedures that the BOCs should follow to safeguard access to their CPNI [208] and to release aggregate CPNI to competing ESPs. [209] All the BOCs are required to amend their ONA plans to conform to these requirements, and when its amendments become effective, BellSouth must implement them for VMS, as well as for all of its other enhanced offerings.

86. Second, in the interim period until BellSouth's ONA amendments for CPNI are approved and implemented, BellSouth may follow the CPNI procedures proposed in its CEI plan, as amended, with one qualification. In the *BOC ONA Order*, the Commission required the BOCs to amend their ONA plans to address concerns similar to those expressed in this proceeding by ATSI concerning the treatment of the call forwarding information of a VMS customer. [210] During the interim period before ONA plan amendments become effective, we prohibit BellSouth from using CPNI to identify particular customers of existing VMS competitors for "targeted" marketing efforts. We require BellSouth to amend its CEI plan formally committing itself to this course. [211]

87. We note BellSouth's plans to contact customers to clarify the scope of their CPNI requests. We do not expect BellSouth to use such contacts as a means of imposing improper pressure on its customers, and we caution BellSouth to avoid any such tactics. We recognize, however, as we did in the *Second BOC CPE Order*, that such contacts by a BOC are necessary and appropriate in certain situations. [212]

c. *Nondiscrimination Reporting*

88. The *Phase II Order* required that BOCs must file quarterly nondiscrimination reports that provide comparative data on the timing of installation and maintenance, as well as the quality and reliability, of the basic services offered as part of any CEI tariff. [213] The *Phase II Reconsideration* delegated to this Bureau authority to eliminate the requirement that the BOCs submit reports on the quality of the basic services included in their CEI offerings, provided that each BOC (1) amends its ONA plan to include a detailed description of its installation procedures that demonstrates its inability to engage in quality-based discrimination, and (2) submits an annual affidavit attesting that it has followed the installation procedures described in its ONA plan amendments and that it has not, in fact, discriminated in the quality of network services used by competing ESPs. [214]

89. The *Phase II Reconsideration* modified the installation and maintenance nondiscrimination reporting requirement to provide that, with Bureau approval, the BOCs need only file reports comparing installation and maintenance intervals provided to their own enhanced service operations with those provided to a sampling of all of their customers. The Commission held that, to qualify for this modified reporting requirement, a BOC must file detailed descriptions of its installation and maintenance procedures demonstrating that it lacks the ability to discriminate.

(1) *Positions of the Parties*

90. BellSouth asserts that it demonstrated in its ONA plan that its procedures for installation, maintenance, and repair ensure nondiscriminatory provision of basic services to all enhanced service providers. [215] It attaches the same description of those procedures as Appendix B of the CEI plan.

91. ANPA contends that BellSouth's proposed reporting plan fails to distinguish between "maintenance" and "repair," which it says will make it impossible to distinguish between the time intervals that BellSouth spends responding to trouble reports as opposed to times involved in the company's ongoing maintenance activities. [216] Moreover, it says, BellSouth does not mention any procedure for reporting on complaints that it receives, nor does it identify the methods that it will use for developing the samplings of customers by which BellSouth will compare the service that it provides to itself and others. [217] ANPA also urges that we require BellSouth to supplement its plan to explain its process for setting long-term priorities for testing and maintenance not related to service orders. [218] At the very least, it says, BellSouth should identify geographic divisions currently used to schedule maintenance, the categories of personnel who decide priorities, and whether it will impose any restrictions generally on contact between "personnel [who] are likely to have contact with enhanced services development and marketing personnel." [219]

92. BellSouth replies that ANPA is objecting to the terms of the Commission nondiscrimination reporting requirements and seeking to impose additional requirements on BellSouth. [220] It urges us to resist what it characterizes as ANPA's attempt to turn a CEI plan review into a Rule Making proceeding. [221] BellSouth argues that the Commission has never required the BOCs to divide reporting between maintenance and repair activities or to describe the sampling methodologies they use for comparative reporting purposes, and it argues that the Commission should not impose such requirements now. [222] Similarly, BellSouth says that the Commission did not direct the BOCs to describe their methods for handling complaints of discriminatory treatment, but required instead that the BOCs describe in their nondiscrimination reports any complaints that arise. [223] Finally, BellSouth contends that its description of nondiscrimination reporting procedures filed in this proceeding is "in all essential respects" the same description that we approved in the *BOC CPE Relief* proceeding. [224] However, it states that it has supplemented that description to address the Commission's concerns over the perceived potential for discrimination arising from the use of special tariff sections for ESPs, and it says that no party has argued that it failed to meet those concerns. [225]

(2) *Discussion*

93. We agree with BellSouth that ANPA appears in large part to be seeking changes in the Commission's rules rather than evaluating BellSouth's compliance with those rules. This CEI proceeding is concerned with the latter. To the extent that ANPA's arguments can be viewed as raising legitimate implementation issues, we do not find them convincing. In our view, the additional requirements sought by ANPA would simply add to the complexity of our nondiscrimination reporting rules and the burden of complying with them without materially advancing the Commission's goal of nondiscriminatory conduct by the BOCs.

94. We note, however, that the *BOC ONA Order* addresses nondiscrimination reporting concerns and requires several revisions to the reporting formats proposed by BellSouth and other BOCs. [226] The Commission permitted BellSouth to modify the format of its nondiscrimination reports to compare installation and maintenance performance for its own enhanced services with that provided to a sampling of all customers, [227] but it required BellSouth to amend its ONA plan to disaggregate its proposed reporting categories to report on each ONA service, including each BSA, BSE, and CNS that its enhanced services operation purchases for its provision of

enhanced services. [228] For each such category, the Commission required all of the BOCs, including BellSouth, to show total orders, due dates missed, and average intervals.[229] Once these amendments become effective, BellSouth should incorporate them into its CEI plan. As an interim measure, prior to final approval and implementation of these amendments, BellSouth may submit reports in the format proposed in its ONA plan, as it proposes in its CEI plan.

d. *Network Information Disclosure*

95. The *Phase II Order* established specific requirements that the BOCs must follow in disclosing information about network changes or new network services that affect the interconnection of enhanced services with the network. [230] Neither BellSouth nor any of the commenting parties explicitly address the network information disclosure requirement. Noting BellSouth's silence on the network information disclosure requirement, we condition our approval of the plan on BellSouth's compliance with this requirement. [231]

V. ORDERING CLAUSES

96. IT IS HEREBY ORDERED, that pursuant to Sections 1, 4(i) and (j), 201, 202, 203, 205, 218, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 201, 202, 203, 205, 218, and 405, and 5 U.S.C. § 553, BellSouth's CEI Plan for VMS IS APPROVED, subject to the conditions described herein.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

APPENDIX

PARTY FILING CEI PLAN

BellSouth Corp., South Central Bell Telephone Company, and Southern Bell Telephone and Telegraph Company (BellSouth)

PARTIES FILING COMMENTS ON CEI PLAN

ADAPSO

ALC Communications Corp. (ALC)

American Newspaper Publishers Assn. (ANPA)

American Telephone and Telegraph Company (AT&T)

Assn. of Telemessaging Services International, Inc. (ATSI)

Centigram Corp. (Centigram)

Coalition of Open Network Architecture Parties (CONAP)

Florida Public Service Commission (Florida)

Information Industry Assn. (IIA)

MCI Telecommunications Corp. (MCI)

Octel Communications Corp. (Octel)

Telenet Communications Corp. (Telenet)

Tymnet-McDonnell Douglas Network Systems Company (Tymnet)

PARTIES FILING REPLIES TO COMMENTS ON CEI PLAN

BellSouth

TRINTEX

PARTY FILING AMENDMENT TO CEI PLAN

BellSouth

PARTIES FILING COMMENTS ON AMENDMENT TO CEI PLAN

AT&T

MCI

Telenet

Tymnet

PARTY FILING REPLY TO COMMENTS ON AMENDMENT TO CEI PLAN

BellSouth

FOOTNOTES

[1] Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), *Report and Order*, 104 FCC 2d 958 (1986) (*Phase I Order*), *modified on reconsideration*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration*), *further reconsideration*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration*), *second further reconsideration pending, appeals pending sub nom. California v. FCC*, No. 87-7230 (9th Cir.) (pet. for rev. filed May 28, 1987) and *sub nom. Illinois Bell Telephone Co. v. FCC*, No. 88- 1364 (D.C. Cir.) (pet. for rev. filed May 16, 1988). *See also Report and Order*, 2 FCC Rcd 3072 (*Phase II Order*), *modified on reconsideration*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration*), *further reconsideration pending*, (pet. for rev. filed Apr. 20, 1988), *California v. FCC*, No. 88-7183 (9th Cir.) (pet. for rev. filed May 13, 1988) and *Illinois Bell Telephone Co. v. FCC*, No. 88-1364 (D.C. Cir.) (pet. for rev. filed May 16, 1988).

[2] A list of commenters on the plan and the amendment appears in Appendix A. We use the abbreviations in that appendix throughout this order.

[3] Unless we take action to the contrary within 14 days after the latest date on which BellSouth submits the informational amendments required in paras. 29, 34, and 43, *infra*, this plan shall be deemed approved. In addition, if BellSouth desires to offer VMS or CEI for VMS under any conditions other than those approved in this order, it must either amend its plan or file a new one.

[4] *Phase I Order*, 104 FCC 2d at 1020, para. 115. The BOCs also must satisfy the cost allocation requirements of the *Joint Cost Order*, which established compliance filing requirements that are separate from the CEI requirements. *See Joint Cost Order*, 2 FCC Rcd 1298 (1987), *modified on recon.*, 2 FCC Rcd 6283 (1987) (*Joint Cost Recon Order*).

[5] *Phase I Order*, 104 FCC 2d at 1036, para. 147. at 1036, para. 147.

[6] *Id.* at 1039-1043, paras. 154-165.

[7] Plan at 2. Further references herein to the BellSouth ONA plan shall denote the plan as amended, unless otherwise indicated.

[8] *Id.*

[9] Filing and Review of Open Network Architecture Plans, CC Docket No. 88- 2, Phase I, *Memorandum Opinion and Order*, FCC 88-381 (released Dec. , 1988).

[10] *Phase I Order*, 104 FCC 2d at 1054-1055, para. 190.

[11] Plan at 4.

[12] *Id.*

[13] *Id.* at 4-5.

[14] ANPA Comments at 2-3; ATSI Comments at 12. By way of example, ANPA says that it cannot determine from the plan in what way BellSouth will assign "addresses" to the voice "mailboxes" of VMS providers. ANPA Comments at 2-3.

ANPA also argues that a more detailed description of BellSouth's enhanced service is necessary to determine whether or not BellSouth will comply with the Modified Final Judgment (MFJ). ANPA Comments at 3, *citing U. S. v. Western Electric Co.*, Civ. Act. No. 82-0192 (D.D.C. March 7, 1988) (*March 7 Order*). *See also* ANPA Comments at 10 and Telenet Comments at 10 (plan is inconsistent with MFJ ban on user profiles); Telenet Comments at 10- 11 (release of CPNI to BellSouth ESPs without releasing to unaffiliated ESPs violates MFJ). We do not address MFJ issues in this order because the Commission has held that restrictions in the MFJ do not affect its independent evaluation of CEI plans for compliance with Commission regulations. Pacific Bell and Nevada Bell Plan for the Provision of Voice Mail Services, *Memorandum Opinion and Order*, 3 FCC Rcd 1095 (1988) (*Pacific CEI Order)* at 1103, para. 75.

Several other parties recommend that we stop reviewing BellSouth CEI plans until the Commission has approved its ONA plan. ADAPSO Comments at 3 and 7-8; CONAP Comments at 2-4; IIA Comments at 3; MCI Comments at 1-4; Telenet Comments at 4; Tymnet Comments at 4-6. *But see* Centigram Comments at 5-10; Octel Comments at 2. We reject the recommendations of commenters urging delay as inconsistent with the overall framework of the *Computer III* proceeding and the specific language of the *Phase I Order*. *See id.*, 104 FCC 2d at 1020, para. 115; Southwestern Bell Telephone Company Comparably Efficient Interconnection Plan for the Provision of Voice Messagin Services, *Memorandum Opinion and Order*, DA 88-1469, released September 29, 1988 (*SWBT VMS CEI Order)* at para. 49; Bell Atlantic Telephone Companies Offer of Comparably Efficient Interconnection to Providers of Gateway Services, DA 88- 1512, released September 30, 1988 (*Bell Atlantic Gateway CEI Order)* at para. 61.

[15] BellSouth Reply at 6.

[16] *Id.* at 7-8.

[17] ANPA has expressed concern about the assignment of voice mailbox "addresses." We regard that process as one that is likely to be internal to a voice messaging service. As discussed below, BellSouth will forward calls from customers to their VMS providers, and it has devised means of forwarding the called number to the VMS provider, so that the VMS service can determine the identity of the customer for whom it will be recording a message. Assuming that BellSouth provides that information to other ESPs on the same basis that it provides it to its own VMS service, BellSouth will satisfy the Commission's CEI requirements.

[18] *Phase I Reconsideration*, 2 FCC Rcd at 3048, para. 92.

[19] *Id.* at 3048, para. 92.

[20] Plan at 2. BellSouth's ONA plan defines ESP access links as the facilities used to connect an ESP to its serving central office; features/functions as capabilities located at central offices; and transport/usage as the network facilities that complete the connection from the ESP's serving central office to its customers' serving offices or to other facilities associated with network services provided to the ESPs' customers. Options selected from each of these three categories, when combined to form a complete connection of an ESP to and through the network, comprise what BellSouth and the other BOCs call a "Basic Serving Arrangement" (BSA). BellSouth ONA Plan at 8-9. Under the BOCs' nomenclature, a BSE is an optional network capability that may be selected in conjunction with a BSA. *Id.* at 9.

[21] Plan at 5.

[22] *Id.* at 5-6.

[23] *Id.*

[24] *Id.*

[25] Hunting service augments multiline telephone service by searching for an idle line in a group of lines -- referred to as the "hunt group" -- and routing the next incoming call to it. *See* Investigation into the Quality of Equal Access Services, TDX Petition for Rule Making, RM-5196, *Memorandum Opinion and Order*, FCC 86-248, released May 23, 1986, at para. 84 and nn. 48 and 50.

[26] Plan at 7-8. BellSouth characterizes the SCNO, which it did not initially include in its ONA plan, as a means of overcoming, to some degree, BellSouth's present inability to forward calling number information between customers served by different central offices. *Id.* at 8 and n. 3. It states that an ESP that subscribes to that option will be assigned one or more directory numbers in the nearby central office that directly serves the ESP, to which the ESP's customers outside that area could forward their calls. *Id.* Each of those preassigned numbers would then be permanently forwarded to a number in the ESP's multiline hunt group. The ESP could then identify the customer based on the preassigned number through which the customer's calls were forwarded. *Id.* at 8 n. 4. While the SCNO would not directly provide the "real" calling number, the enhanced service provider could readily determine that number from its client lists. Moreover, says BellSouth, the SCNO could allow the provision of VMS with calling number identification to customers who are not located in areas served by switches equipped with advanced generic software. *Id.* at 8 n. 3.

[27] *Id.*, Appendix A at 1, § A32.2.2(E). The plan also proposes to restrict access to "ESP Access Links" to ESPs. We discuss that provision of the plan *infra*, para. 60.

[28] Plan at 6; Plan Appendix A at 6, § A32.2.6(C).

[29] BellSouth Amendment at 3.

[30] *Phase I Order*, 104 FCC 2d at 1039-1043, paras. 154-165.

[31] Parties had no comments on, or raised no substantive objections to, BellSouth's treatment of end user access or installation, maintenance, and repair. Based on our examination of the plan and the amendment regarding these parameters, we approve BellSouth's treatment of them.

[32] *Id.* at 1039, para. 157.

[33] Plan at 9.

[34] *Id.*

[35] ANPA Comments at 5.

[36] BellSouth Reply at 7.

[37] *Phase I Order*, 104 FCC 2d at 1040, para. 158.

[38] *Id.* at 1040, para. 159.

[39] Plan at 9.

[40] *Id.* at 6.

[41] *See , e. g.*, ALC Comments at 9-10; AT&T Comments at 1-3; ADAPSO Comments at 4; ANPA Comments at 4; ATSI Comments at 5-6; CONAP Comments at 3.

[42] Telenet Comments at 14.

[43] *Id.* at 15.

[44] *Id. See supra* note 14.

[45] *Id.* at 16.

[46] BellSouth Reply at 9.

[47] *Id.* at 9.

[48] *Id.* at 9-10.

[49] *Id.* at 10 and n. 6.

[50] *Id.* at 10 n. 6.

[51] *Id.*

[52] BellSouth Reply to Comments on Its Open Network Architecture Plan, CC Docket No. 88-2, Phase I, filed May 31, 1988, at 6 n. 5 and Appendix B at 1.

[53] *Phase I Order*, 104 FCC 2d at 1041, para. 160.

[54] Plan at 10.

[55] *Id.* at 10-11.

[56] ANPA Comments at 5.

[57] *Id.* at para. 149.

[58] *Phase I Order*, 104 FCC 2d 1041, para. 163.

[59] Plan at 12.

[60] *Id.*

[61] *Id.* The SCNO is described *supra*, para. 11.

[62] ANPA Comments at 7.

[63] *Id.* ANPA apparently expects BellSouth to begin rapidly implementing VMS services in one community after another when its CEI plan is approved.

[64] BellSouth Reply Comments at 11.

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] BellSouth also has committed itself to comply with the Commission's advance testing requirement, which provides that the carrier must give ESPs a reasonable opportunity to test new CEI offerings before a BOC makes those offerings fully operational. *Phase I Order*, 104 FCC 2d at 1041, para. 163.

[69] Moreover, if BellSouth decides to deploy VMS elsewhere, it must update its plan in advance of such planned deployment to specify such additional locations. *See Bell Atlantic VMS CEI Order*, 3 FCC Rcd at 5774, para. 25.

[70] *Id.* at 1042, para. 164.

[71] *Phase I Reconsideration*, 2 FCC Rcd at 3068, n. 261.

[72] *Phase II Reconsideration*, 3 FCC Rcd at 1155, at para. 34.

[73] Plan at 15.

[74] *Id.*, Attachment A at 7, § A32.2.8.A.1.

[75] *Id.* at § A32.2.8.A.2.

[76] *Id.* at 15.

[77] *Id., citing Pacific CEI Order*, 3 FCC Rcd at 1098, paras. 34-35 (1988); and *Bell Atlantic VMS CEI Order*, 3 FCC Rcd at 1110, para. 24, and 1111, para. 31 (1988).

[78] Plan at 6-7 and 14-15; Plan Appendix A at 5, § A32.2.6.B.3.a. The illustrative tariff attached to the Plan states that a DS1 channel can typically carry the equivalent of 24 voice circuits. Attachment A at 5, § A32.2.6.A.1.b.

[79] *Id.* at 14-15.

[80] *Id.* at 15.

[81] ANPA Comments at 7.

[82] CONAP Comments at 3 n. 7. CONAP does not indicate what language in the BellSouth ONA plan leads it to this conclusion, but it is presumably referring to the fact that BellSouth's ONA plan proposes a "Basic Interconnection Alternative" charge, instead of an access charge, for connecting collocated ESP equipment to the network. BellSouth ONA Plan at 71. A sample tariff that BellSouth attaches to its ONA plan shows two rate bands for ESP access links: 0.1 to "X" miles and more than "X" miles. *Id.*, Attachment Q at 15, § A32.8.1.A.

[83] Florida Comments at 2.

[84] Telenet Comments at 12.

[85] *Id.* at 12-13.

[86] *Id.* at 13.

[87] BellSouth Reply Comments at 11-12, *citing* Plan at 15 and *Pacific CEI Order* at para. 35.

[88] *Id.* at 12.

[89] Amendment at 5.

[90] *Id.* at 5-6.

[91] *Id.* at 6.

[92] *BOC ONA Order* at paras. 166-168.

[93] *Phase I Order*, 104 FCC 2d at 1042, para. 165.

[94] *Phase I Reconsideration*, 2 FCC Rcd at 3051, para. 111, *aff d, Phase I Further Reconsideration*, at paras. 63-77.

[95] Plan at 13-14.

[96] The plan's illustrative sample tariff states, "[A]n ESP cannot utilize a non-ESP service (such as an individual business line) in place of an ESP Access Link." Plan Appendix A at 1, § A32.2.2.E.

[97] *Id.* at 14.

[98] *Id.* at 13.

[99] Plan Appendix A at 9, §A32.2.8.C.1.a.

[100] *Id.*

[101] *Id.* at 14.

[102] ADAPSO Comments at 5; ALC Comments at 5; ATSI Comments at 6-8; AT&T Comments at 3-4; IIA Comments at 4-5; MCI Comments at 8; Telenet Comments at 5-6; Trintex Comments at 4-6. *See also* Florida Comments at 2.

[103] *See , e.g.*, AT&T Comments at 1-4; MCI Comments at 8.

[104] ALC Comments at 9, *citing* Plan at Appendix A, §§ A32.2.2.E and A32.2.2.F.

[105] *Id.* at 9-10.

[106] ALC Comments at 5.

[107] *Id.* at 6.

[108] ANPA Comments at 7, *citing Phase I Order*, 104 FCC 2d at 1035, para. 145, and 1042, para. 165.

[109] ATSI Comments at 6.

[110] *Id., citing Phase I Further Reconsideration*, 3 FCC Rcd at 1143, para. 64.

[111] *Id.* at 7.

[112] *Id.*

[113] *Id.* at 8.

[114] AT&T Comments at 3-4.

[115] MCI Comments at 8.

[116] *Id., citing Pacific CEI Order*, 3 FCC Rcd at 1099, para. 37; Bell Atlantic CEI Plan for the Provision of Voice Messaging Services, filed March 30, 1988, at 8.

[117] *Id.* at 9.

[118] Florida Comments at 2.

[119] *Id.*

[120] IIA Comments at 4-5.

[121] *Id.* at 5.

[122] *Id.* at 6.

[123] Telenet Comments at 5. Telenet also claims that BellSouth's use restrictions, combined with its pricing strategy for ESPs, is a "back door" attempt to impose carrier access charges upon ESPs. *Id.* at 8 n. 3.

[124] Trintex Reply Comments at 6.

[125] *Id.* at 4.

[126] Id. at 5.

[127] BellSouth Reply at 12-13, *citing Enhanced Service Access Charge Termination Order,* 3 FCC Rcd 2631 (1988).

[128] *Id.* at 13.

[129] *Id.* at 15 and Exhibit 1, Tables I and II.

[130] *Id.* at 16. BellSouth further rejects Telenet's argument that it is proposing a "back door" way of implementing the interstate access charges that the Commission considered in CC Docket No. 87-215. Id. at 21-22. The only similarity between interstate switched access charges and its proposed CEI transport charge, it says, is that both are usage-sensitive. *Id.* at 22.To the extent that commenters are arguing that no state may ever impose anything other than a flat-rate business line charge on an enhanced service provider, says BellSouth, those arguments are outside the scope of this proceeding. *Id.*

[131] BellSouth Reply, Exhibit 1, Tables I and II.

[132] BellSouth attaches a table showing the overall charges that it would apply, under various scenarios, to voice-messaging ESPs whose customers were supplied with BellSouth's call forwarding-variable and call forwarding-when-busy features. *Id.*, Table III. BellSouth's ONA plan states that call forwarding-variable enables customers to transfer incoming calls to another location by entering a code and the telephone number to which calls are to be transferred. BellSouth ONA Plan, Attachment B at 2. The call forward-busy line feature forwards a customer's incoming calls to an ESP when the customer's line is busy. *Id.* The CEI plan shows what BellSouth would charge non-ESP customers for an equivalent service package consisting of flat-rated business lines, hunting, and call forwarding-variable. In general, the plan shows ESPs being charged less than other customers when their usage perline is less than 100 hours per month, and more than other customers when their usage per line is more than 100 hours per month. BellSouth Reply, Exhibit 1, Table III. The most favorable scenario for ESPs shows them with a 13 percent price advantage, when the ESP and the comparable non-ESP customer each has 4359 customers using each of 72 lines for 75 hours per month. *Id.* The least favorable scenario for ESPs shows them paying 19 percent more than other customers for equivalent service, when the ESP and the comparable non-ESP customer each has 1439 customers using each of 28 lines for 125 hours per month. *Id.*

[133] Amendment at 3.

[134] *Id.* at 3 n. 3.

[135] *Id.* at 5.

[136] *Id.* at 5 n. 5.

[137] AT&T Comments on Amendment at 1.

[138] MCI Comments on Amendment at 6.

[139] Telenet Comments at 7.

[140] *Id.*

[141] Tymnet Comments on Amendment at 4.

[142] Telenet Comments on Amendment at 5; Tymnet Comments at 3.

[143] *BOC ONA Order* at paras. 321-324. The Commission expressly disapproved that portion of the BellSouth state tariffing proposal that deprived ESPs of existing state access arrangements. *Id.* at paras. 321-322. The Commission also required BellSouth to eliminate or provide further justification for the proposed use restrictions in its plan that would have limited certain ONA services to ESPs. *Id.* at para. 324. If BellSouth chooses to retain the latter form of use restriction, and the Commission approves BellSouth's justification for doing so in the ONA proceeding, we will permit BellSouth to restrict the basic services that underlie its VMS offeringto ESPs.

[144] In doing so, BellSouth avoids changing the existing ESP "exemption" from access charges and conforms to the requirements of the *BOC ONA Order. Id. See supra* note 130.

[145] *Id.* at n. 750. The Commission defined a use restriction as a tariff term or condition that restricts a certain class of users from obtaining a tariffed service or from using it in a specified manner. *Id.*

[146] ADAPSO Comments at 5; ALC Comments at 10-11; ATSI Comments at 10-11; MCI Comments at 9; Telenet Comments at 5.

[147] ADAPSO Comments at 5.

[148] ALC Comments at 1-2.

[149] *Id.* at 11 n. 19.

[150] *Id.* ALC specifically argues that BellSouth's requirement that intrastate private line/special access rates be applied for the use of dedicated connections with its proposed CEI arrangements is improper, because those connections will carry interstate as well as intra state traffic. *Id.* at 10. ALC cites Commission and court decisions that it says require that interstate rates be applied to dedicated channel services that carry interstate communications. *Id.* at 10 n. 18, *citing Alascom, Inc. v. FCC, 727F.2d 1212, 234 [sic?] (D.C. Cir. 1984); Interconnection With Specialized Carriers in Furnishing Interstate and Foreign Exchange Service and Common Control Switching Arrangements,* 56 FCC 2d 14 at paras. 17-19 (1975).

[151] AT&T Comments at 4, *citing Phase I Reconsideration,* 2 FCC Rcd at 3043, para. 52.

[152] MCI Comments at 9.

[153] *Id.*

[154] Telenet Comments at 5.

[155] *Id.*

[156] *Id.* at 6 n. 2.

[157] ATSI Comments at 10-11.

[158] Florida Comments at 1.

[159] BellSouth Reply Comments at 27-28.

[160] *Id.* at 28, *citing Pacific CEI Order,* 3 FCC Rcd at 1103, para. 73.

[161] *Id.*

[162] AT&T Comments on Amendment at 1-2; Telenet Comments on Amendment at1-2; Tymnet Comments on Amendment at 3.

[163] *BOC ONA Order* at para. 276.

[164] *Id.* at para. 279 and n. 631.

[165] *Id.* at para. 281.

[166] BellSouth, of course, files federal access tariffs now, and any ESP, including any VMS provider, may purchase services from such tariffs for use in their interstate enhanced offerings. See First Data Resources, Inc., *Memorandum Opinion and Order,* Mimeo No. 4732 (released May 28, 1986). By permitting

state tariffing of CEI services, we do not mean to suggest that BellSouth, or any BOC, can restrict the ability of ESPs to obtain access services from existing federal tariffs.

[167] Regarding Florida's claim that VMS is a local service subject to state jurisdiction, we note that the Commission found in the Computer II proceeding that enhanced services are not common carrier communication services, and it preempted the states from imposing common carrier tariff regulation on such offerings. Amendment of Section 64.702 of the Commission's Rules, *Memorandum Opinion and Order*, 77 FCC 2d 384 (1980) *(Computer II Final Decision)* at 431-35, 450-57. The court upheld that decision in its entirety. *Computer and Communications Industry Assn. v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) at 205-206 and nn. 26-28, *cert. denied*, 461 U.S. 938 (1983). However, the Commission has acknowledged the states' authority over the rates, terms, and conditions of intrastate basic services that are used by ESPs. *Phase I Reconsideration*, 3 FCC Rcd at 1144, para. 71.

[168] *Phase I Order*, 104 FCC 2d at 1048-9, paras. 174-175.

[169] *Phase I Reconsideration*, 2 FCC Rcd at 3068, n. 261.

[170] *Id.* at 3054, para. 134.

[171] Plan at 16.

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] ATSI Comments at 10; Telenet Comments at 7.

[176] ADAPSO Comments at 4 and 6.

[177] BellSouth Reply at 19.

[178] *Id.* at 21.

[179] *Phase II Reconsideration*, 3 FCC Rcd at 1157, para. 49.

[180] As mentioned above, the *BOC ONA Order*, while permitting the BOCs to file state tariffs for CEI/ONA services, also requires them, after completion of a forthcoming Rule Making concerning Part 69 of our Rules, to file interstate tariffs for such services.

[181] *Phase II Order*, 2 FCC Rcd at 3094-3098, paras. 152-156, 162-165, 172-174, and 176.

[182] Plan at 19.

[183] ANPA Comments at 10, *citing Phase II Reconsideration*, 3 FCC Rcd at 1163, para. 99.

[184] *Id.* at 11.

[185] *Id.* at 11-12.

[186] *Id.* at 12.

[187] ATSI Comments at 3.

[188] *Id.* at 4.

[189] *Id.*

[190] *Id.*

[191] *Id.* at 4-5.

[192] *Id.* at 5.

[193] Telenet Comments at 10-11, *citing March 7 Order*, slip op. at 66 andn. 40. Telenet quotes language from page 66 and note 40 of the slip opinion that prohibits the BOCs from discriminating "between and among providers of information services or of voice storage and retrieval services" and bars the BOCs from maintaining "user profiles" that "contain detailed information on users' favorite services, times of use, monthly expenditures, and user habits." Telenet Comments at 10.

[194] *Id.* at 11.

[195] *Id.* at 11-12.

[196] BellSouth Reply at 24-25, *citing* Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, CC Docket No. 86-79, *Order*, DA 88-705, released May 11,1988 *(Second BOC CPE Order)*.

[197] *Id.* at 25.

[198] *Id.*

[199] *Id.*

[200] BellSouth Reply at 23.

[201] *Id.* 23, citing 3 FCC Rcd 412 (1988) and *Second BOC CPE Order* at note 46 (if a BOC cannot fulfill a particular request [for partial CPNI restriction], . . . it . . . can contact the customer to resolve the situation).

[202] *Id.* at 23-24.

[203] *Id.* at 24.

[204] *Id.*

[205] Plan at 6-7.

[206] *Id.* at 7.

[207] *Id.* at paras. 411-415.

[208] *Id.* at paras. 426-430.

[209] *Id.* at para. 450. For reasons stated above, we will not assess BellSouth's compliance with the Commission's CEI and other nonstructural requirements on the basis of parties' arguments that it does or does not comply with the MFJ. *See supra* note 14.

[210] *Id.* at para. 437.

[211] We conditioned our approval of Southwestern Bell Telephone Company's CEI plan for VMS on a similar commitment by Southwestern. *SWBT VMS CEI Order* at para. 37. This requirement will be superseded by the requirements of the BOC ONA Order when it becomes effective.

[212] *Id.* at 11 n. 46.

[213] *Phase II Order*, 2 FCC Rcd at 3082, para. 73.

[214] *Phase II Reconsideration* at paras. 76-77.

[215] Plan at 18.

[216] ANPA Comments at 9.

[217] *Id.* at 10.

[218] *Id.* at 6.

[219] *Id.* We infer that ANPA is referring to contact between basic services personnel and personnel involved in the marketing of enhanced services.

[220] BellSouth Reply Comments at 26.

[221] *Id.*

[222] *Id. at* 26-27.

[223] *Id.*

[224] *Id.*

[225] *Id.*

[226] *BOC ONA Order* at paras. 467-431, 481-488.

[227] *Id.* at para. 483.

[228] *Id.* at para. 487.

[229] *Id.* at para. 488.

[230] *Phase II Order* at 3087-88, paras. 107-112.

[231] BellSouth must of course comply with these requirements in disclosing technical information about its CEI services prior to offering its VM Sservice.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WASHINGTON INTERNATIONAL TELEPORT, INC. File No. CSG-88-036-ML

Application for authority to modify and operate an international multipurpose INTELSAT Revised Standard A earth station at Bren Mar, Virginia.

WASHINGTON INTERNATIONAL TELEPORT, INC. File No. I-T-C-88-100

Application for authority to establish channels of satellite communications through an international multipurpose INTELSAT Revised Standard A earth station at Bren Mar, Virginia

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: December 14, 1988; Released: December 23, 1988

By the Chief, International Facilities Division:

1. On March 29, 1988, Washington International Teleport, Inc. (WIT) filed an application requesting authority under Title III of the Communications Act of 1934, as amended, and Section 201(c)(7) of the Communications Satellite Act of 1962, as amended, to modify its INTELSAT Business Services (IBS) and international television earth station at Bren Mar, Virginia, to operate as an INTELSAT Revised Standard A multipurpose earth station with INTELSAT Atlantic Ocean Region (AOR) satellites for the provision of international telecommunications services. On the same day, WIT filed a companion application requesting authority pursuant to Section 214 of the Communications Act of 1934, as amended, to establish international satellite channels of communication through this earth station and to acquire INTELSAT space segment capacity from the Communications Satellite Corporation (Comsat) necessary to establish 1002 voice-grade circuits between the U.S. mainland and points served by the INTELSAT AOR satellites.[1] The applications were placed on public notice on April 13 and April 6, 1988, respectively. No comments were received.

2. The proposed multipurpose earth station at Bren Mar, Virginia, will consist of an 18.3-meter antenna meeting INTELSAT Revised Standard A technical parameters. The earth station will operate in the 5925 -6425 MHz transmitting frequency band and the 3700 - 4200 MHz receiving frequency band with INTELSAT AOR satellites and will be located at WIT's existing earth station facility at Bren Mar, Virginia. WIT has been granted blanket authority to establish and operate channels of communications between the U.S. mainland and various international points for the provision of IBS and international television services.[2] WIT requests 1002 satellite circuits for the provision of its International Message Telephone Service (IMTS) and non-IMTS services to Atlantic Region points from the Bren Mar earth station.

3. The Title III application indicates that the proposed earth station will be equipped with up and down converters, multiplexers, and modems to permit the provision of Frequency Division Multiplex/Frequency Modulation (FDM/FM) analog services in addition to IBS and television services. Connectivity is currently provided through microwave links operated by WIT and through various other transmission media between WIT's Bren Mar Teleport and its customers. As a result, the proposed earth station will be able to provide IMTS and non-IMTS services to the public and to other carriers. The application further indicates that the proposed multipurpose earth station will require a capital expenditure of approximately 1,943,800.

4. In its Report and Order in the *Earth Station Ownership Proceeding*, CC Docket No. 82-540, the Commission established a more open and flexible earth station policy which allowed entities other than the Earth Station Ownership Committee (ESOC) to own and operate international earth stations that access the INTELSAT system. The Order permitted the joint carrier owners of ESOC earth stations to decide among themselves the future of ESOC. [3] The Commission also concluded that when reviewing applications for these international earth stations, it would distinguish between earth stations dedicated to providing IBS and/or television services and multipurpose stations. IBS and/or television earth stations, the Commission found, do not have the same potential for revenue diversion and significant impact on system efficiency as multipurpose earth stations. Consequently, the Commission concluded that it would consider only the minimal legal, financial and technical qualifications of the applicant as required by Sections 308 and 319 of the Communications Act of 1934, as amended, when reviewing applications for IBS and/or television earth stations. Absent special problems, the Commission stated that it would treat these applications as routine and process them expeditiously.

5. With respect to multipurpose stations, the Commission stated that it would continue close scrutiny of applications for construction and operation of these facilities since they tend to raise more complex economic, technical and operational issues that may affect the variety, quality and price of service offered to users. In determining whether the grant of an application for a multipurpose earth station will serve the public interest, the Commission indicated it would conduct an analysis by balancing the possible benefits (*e.g.*, shorter terrestrial hauls, increased user options, lower charges to users, and increased customer base for INTELSAT services) against the possible detriments (*e.g.*, reduced technical efficiency, harmful revenue diversion, service deterioration and higher charges to users) which a particular application may present.[4] However, with the dissolution of ESOC earth

station ownership arrangements and the transition to a competitive environment, the issue of harmful revenue diversion from existing ESOC earth stations is no longer a concern. More recently, the Commission has begun to focus on the quality and continuity of service to users and the availability of access to authorized carriers.[5]

6. WIT has the necessary legal, technical and financial qualifications to modify and operate the proposed multipurpose earth station.[6] WIT is an authorized common carrier pursuant to Section 214 of the Communications Act of 1934, as amended, and has previously been authorized to construct and operate earth station facilities for the provision of domestic and international service. The proposed earth station complies with INTELSAT performance criteria for Revised Standard A earth stations. WIT has completed the necessary frequency coordination.

7. WIT asserts that its provision of these services would permit its customers to realize technical and economic efficiencies, and will further the public interest and the Commission's pro-competitive goals by allowing WIT to bring the benefits of competition to its current and future customers including lower-priced, high quality service, broader customer choice, price and service innovation, and more efficient utilization of existing telecommunications facilities.

8. In light of the factors, we conclude that the public interest will be served by the modification and operation of the proposed INTELSAT Revised Standard A multipurpose earth station at Bren Mar, Virginia. We find that the reduction in the length of the terrestrial connecting facilities required to access the proposed earth station from Washington, D.C., when compared to the length of the terrestrial connecting facilities required to access the Etam, West Virginia, and Roaring Creek, Pennsylvania, earth stations should reduce the costs of providing AOR satellite services as well as decreasing the time required to implement new satellite circuits. The distance between WIT's earth station site and Washington, D.C., is only 10 miles as compared with approximately 200 miles between the Etam, West Virginia, earth station and Washington, D.C., and approximately 150 miles between the Roaring Creek, Pennsylvania, earth station and Washington, D.C. The capability of the proposed earth station to provide IMTS and non-IMTS services, coupled with the availability of digital and analog connecting facilities between the earth station and WIT's customers should also benefit customers by making readily available a wide range of digital and analog satellite services.

9. Accordingly, IT IS ORDERED, pursuant to Sections 214, 304, 309 and 319 of the Communications Act of 1934, as amended, and Section 201(c) of the Communications Satellite Act of 1962, as amended, that applications File No. CSG-88-036-ML and I-T-C-88-100 ARE GRANTED and WIT is authorized to:

a. modify and operate the proposed INTELSAT Revised Standard A multipurpose earth station at Bren Mar, Virginia, for the provision of IMTS and non-IMTS services, including but not limited to, high and low speed data, voice, and video services[7]; and for the provision of international telecommunications services[8] WIT is now, or may hereafter be, authorized to provide;

b. acquire the INTELSAT space segment from Comsat in Atlantic Ocean Region satellites for 1002 voice-circuits;

c. acquire and operate the necessary channelizing equipment capable or deriving up to 1002 voice-grade circuits;

d. acquire and operate the necessary domestic connecting facilities between the Bren Mar, Virginia, earth station and WIT's customers' premises in the Washington D.C. metropolitan area; and

e. utilize the foregoing facilities to provide WIT's authorized services to the AOR points listed in the Appendix and to such points which are currently served and may in the future be served by INTELSAT AOR satellites.

10. IT IS FURTHER ORDERED that before completion of equipment installation and facility activation, the applicant shall provide the Commission with a summary of equipment which was actually installed.

11. The Section 214 authorization granted herein to WIT is effective on the adoption date of this order and shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires that a new application be filed. Should the Commission require that a new application be filed, the authorization will continue in effect until Commission action on the application.

12. The Commission retains jurisdiction over this matter to ensure that all present and future authorized carriers have nondiscriminatory use of, and equitable access to, the communications satellite system and earth stations.

13. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between WIT and its correspondents, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

14. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order. (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX

ATLANTIC OCEAN REGION POINTS TO WHICH IT IS AUTHORIZED TO PROVIDE ITS AUTHORIZED IMTS AND NON-IMTS SERVICES

Argentina
Belgium
Brazil
Chile
Colombia
Denmark
France
Greece
Honduras
Ireland
Italy
Netherlands
Norway
Panama
Peru
Portugal
Spain
Sweden
Switzerland
Venezuela
West Germany
United Kingdom

FOOTNOTES

[1] In connection with its Section 214 application, WIT also requests authority to acquire, install and operate necessary channelizing equipment capable of deriving up to 1002 voice circuits and acquire and operate the necessary domestic connecting facilities between the Bren Mar, Virginia, earth station and the WIT customers' premises in the Washington, D.C. metropolitan area.

[2] *See* Communications Technology Management, Inc., File No. I-T-C-85-145, Mimeo No. 5426, (relesed June 28, 1985).

[3] Earth Station Ownership, 100 FCC 2d 250 (1984).

[4] *Id.* at 284.

[5] *See* American Telephone & Telegraph Company, 2 FCC Rcd 6635 (1987).

[6] *See* Communications Technology Management, Inc., File No. CSG-86-002-P/L, Mimeo No. 2579, (released February 14, 1986), and Washington International Teleport, Inc., 2 FCC Rcd (1987).

[7] This authorization is not to be construed as permitting the provision of any service between earth stations located within the United States.

[8] WIT shall request authorization to acquire INTELSAT space segment from Comsat for the provision of new service products or for service to new geographical markets in accordance with the requirements of the Commission's International Competitive Carrier decision, International Carrier Policies, 102 FCC 2d 812 (1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 23, 1988

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON ROCK HILL'S REQUEST FOR TEMPORARY WAIVER OF THE COMMISSION'S EQUAL ACCESS IMPLEMENTATION PLAN FOR INDEPENDENT TELEPHONE COMPANIES

On December 5, 1988, Rock Hill Telephone Company and Home Telephone Company (Rock Hill) filed a petition for a temporary waiver of the Commission's Equal Access Implementation Plan for independent telephone companies. According to Rock Hill, on June 11, 1986, it received a request for an equal access conversion from one of its interexchange carriers. Pursuant to a Commission *Report and Order* (100 FCC 2nd 860 (1985)), Rock Hill is required to complete the conversion within three years of the request date, which, in this case, would be June 11, 1989. Rock Hill states that an additional 3 1/2 months is necessary in order to complete the conversion because its data storage requirements, following equal access conversion, will exceed the storage capacity of its existing disk drives. Rock Hill argues that the additional time is necessary to allow for the delivery of the new disk, installation and testing. Rock Hill believes that equal access conversion will be completed and implemented by September 30, 1989. Rock Hill also notes that the interexchange carrier that requested the conversion has been fully apprised of this situation and it has agreed to the new date of completion.

Interested parties should file comments on this petition by **January 25, 1989,** and reply comments by **February 9, 1989,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of Rock Hill's petition can be obtained from ITS at (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 27, 1988

PLEADING ESTABLISHED FOR COMMENTS ON SWBT'S CEI PLAN FOR PROTOCOL CONVERSION SERVICES

On December 13, 1988, Southwestern Bell Telephone Company (SWBT) filed a comparably efficient interconnection (CEI) plan to provide synchronous and X.PC protocol conversion services on an unseparated basis. According to SWBT, its Public Packet Switched Network has the capability of providing data transport services to customers whose terminals and host computers operate on a variety of protocols. However, to do so, SWBT states that it must perform net protocol conversions between various protocols. Under its proposal, SWBT would provide the necessary protocol conversions on an unseparated basis.

SWBT states that the protocol conversions it proposes under this plan will involve the X.PC, 3270 Bisynchronous (DSP), and the 3270 SNA (DSP) protocols. SWBT notes that in the future, it may expand its offering of new synchronous protocols as new equipment becomes available. SWBT proposes to offer its protocol conversion services in the eleven local access and transport areas (LATAs) within which its basic packet switching service is available.

As required in the Computer III proceeding (*Phase I Order*, 104 FCC 2d 958 (1986), *modified on reconsideration*, 2 FCC Rcd 3035 (1987), *further reconsideration*, 3 FCC Rcd 1135 (1988)), the Commission must approve the CEI plan before SWBT can begin implementing the proposed service.

According to SWBT, it will account for the joint and common costs of the protocol conversion services pursuant to its Part 32 cost allocation manual that the Commission has conditionally approved (Southwestern Bell Telephone Company's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 447 (1988)). SWBT also describes its plans for complying with the other Computer III nonstructural safeguards governing the use of customer proprietary network information, nondiscrimination reporting and nondiscriminatory provisioning, and disclosure of network information.

Interested parties should file comments on SWBT's plan by **January 23, 1989,** and reply comments by **February 7, 1989,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of SWBT's plan can be obtained from ITS at (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
CICI, INC.,
FTC COMMUNICATIONS, INC.,
MCI INTERNATIONAL, INC.,
TRT TELECOMMUNICATIONS CORPORATION,
US SPRINT COMMUNICATIONS COMPANY,
WU WORLD COMMUNICATIONS INC.

File No. SLC-88-004

Joint Application for a License to Land and Operate a High Capacity Digital Submarine Cable System Extending from the United States Mainland to Canada, the United Kingdom, France and Spain.

CABLE LANDING LICENSE

Adopted: December 15, 1988; Released: December 27, 1988

By the Chief, Common Carrier Bureau:

1. We are here considering the above-captioned joint application, filed on August 4, 1988, by several United States International Service Carriers (USISCs) requesting authority, pursuant to "An Act Relating to the Landing and Operation of Submarine Cable in the United States," 47 U.S.C. Sections 34-39, to land and operate, at Manakawkin, New Jersey, the TAT-9 high density digital submarine cable system extending between and among the U.S., Canada, the United Kingdom, France and Spain.

2. The TAT-9 cable system will land in the United States and Canada in North America and extend to landing points in the United Kingdom, France and Spain. The proposed cable system consists of six segments. Segments A through E are, respectively, the cable stations at Pennant Point, Nova Scotia, Canada; Manahawkin, New Jersey; Goonhilly, United Kingdom; St. Hilaire, France; and Conil, Spain. Segment F is the whole of the submarine cable system and includes the system interfaces at the cable stations. Segment F consists of the following subsegments: the main, or transatlantic portion of TAT-9, F3; the spur to Canada, F1; the spur to the U.S., F2; and the spurs to the U.K., France and Spain, F4, F5 and F6, respectively.

3. Segment F will have 15,120 minimum assignable units of ownership (hereinafter MAUOs or 64 kilobit per second (kbit/s) circuits) in the transatlantic portion of the cable. This cable segment bears two digital, optical fiber cable pairs with a design capacity on each pair of 7,560 MAUOs, provided in four 140 Mbit/s streams, with each 140 Mbit/s stream containing 1,890 MAUOs. The cable will branch into two spurs on the North American side and three spurs at a point in the Atlantic Ocean, just off the European continental shelf. The division into these branches, or spurs, and the switching between them, will be accomplished by a Branching Unit (BU). The capacity on each spur is dependent on the number of working fiber pairs. The branches extending to Canada, France and Spain each have one operating fiber pair and a design capacity of 7,560 MAUOs. The U.K. and the U.S. subsegments each have branches containg two operating fiber pairs and a design capacity of 15,120 MAUOs. Since the combined capacity of the eastern and western branches exceeds the transatlantic capacity, each branch will operate at less than maximum capacity.

4. The proposed cable system will be owned by the Joint Applicants, and a number of foreign telecommunications entities. Telecommunications entities in the following countries will participate as owners: Australia, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Japan, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Philippines, Spain, Sweden, Switzerland, Turkey, the United Kingdom and Yugoslavia.

5. Pursuant to our obligations under 47 U.S.C., Sections 34-39, the Department of State has been notified and has approved the landing of the TAT-9 cable system in the U.S. territory.

6. Since existing cable stations will be used for landing this system, the application does not propose a major action within the meaning of Section 1.305 of the Commission's Rules and Regulations implementing the National Environmental Policy Act of 1969, 42 U.S.C. Sections 4321-4347. *See* Report and Order, 49 FCC 2d 1313, 1320 (1974). Consequently, no environmental information is required as part of this application.

7. Concurrent with consideration of this application, the Common Carrier Bureau has granted the applicants authority under Section 214 of the Communications Act of 1934, as amended, to construct and operate the TAT-9 cable system. For the reasons set forth in that order, we find that this application requesting a cable landing license should be granted.

8. Accordingly, the Commission HEREBY GRANTS AND ISSUES under the provision of "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. Sections 34-39, and pursuant to authority delegated to this Commission under Executive Order No. 10530, 3 C.F.R. 1954-1958 Comp., p.189 (1961), *reprinted in* 3 U.S.C. Section 301 app. at 263-265 (1976), to the applicants a license to land and operate one high capacity digital submarine cable having a nominal capacity of 1,130 Mbit/s (565 Mbit/s per pair SL design) with associated regenerators and supervisory circuits and armoring where necessary extending between the U.S. and Canada on the west and the U.K., France and Spain on the east. This license is subject to: (1) "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. Sections 34-39; (2) the Communications Act of 1934, as amended, 47 U.S.C. Sections 151-609; (3) subsequent applicable acts; (4) all rules and regulations of the Federal Communications Commission; (5) any treaties or conventions relating to communications to which the United States of America is now or may hereafter become a party; (6) any actions by the Commission or the Congress of the United States of

America rescinding, changing, modifying, or amending any rights accruing to any person; and (7) the following conditions:

(1) The location of the cable within the territorial waters of the United States of America, its territories and possessions, and upon the foreshore thereof, shall be in conformity with plans approved by the Secretary of the Army, and the cable shall be moved or shifted by the Licensee at its expense upon the request of the Secretary of the Army whenever he or she considers such course necessary in the public interest, for reasons of national defense, or for the maintenance or improvement of harbors for navigational purposes;

(2) The Licensee shall at all times comply with any requirements of United States Government authorities regarding the location and concealment of the cable facilities buildings, and apparatus with a view to protecting and safeguarding the cable from injury or destruction by enemies of the United States of America;

(3) Neither this license nor the rights granted herein, shall be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of or disposed of indirectly by transfer of control of the Licensee to any persons, unless the Federal Communications Commission shall give prior consent in writing;

(4) This license is revocable after due notice and opportunity for hearing by the Federal Communications Commission in the event of breach of nonfulfillment of any requirements specified in Section 2 of "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. Sections 34-39, or for failure to comply with the terms of the authorization;

(5) The Licensee shall notify the Commission in writing of the date on which the cable is placed in service; and this license shall expire 25 years from that date, unless renewed or extended upon proper applications duly filed no less than six months prior to the expiration date; and upon expiration of the license, all rights granted under it shall be terminated; and

(6) The terms and conditions upon which this license is given shall be accepted by the Licensee by filing a letter with the Secretary, Federal Communications Commission, Washington, D.C. 20554, within 30 days of the release of this order.

9. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-136

In the Matter of

AMERITECH SERVICES Revisions to Tariff F.C.C. No. 2	Transmittal No. 241
MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, NORTHWESTERN BELL TELEPHONE COMPANY AND PACIFIC NORTHWEST BELL TELEPHONE COMPANY Revisions to Tariff F.C.C. No. 1	Transmittal No. 208
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY Revisions to Tariff F.C.C. No. 40	Transmittal No. 954
NEW YORK TELEPHONE COMPANY Revisions to Tariff F.C.C. No. 41	Transmittal No. 943
PACIFIC BELL TELEPHONE COMPANY Revisions to Tariff F.C.C. No. 128	Transmittal No. 1383
SOUTHWESTERN BELL TELEPHONE COMPANY Revisions to Tariff F.C.C. No. 68	Transmittal Nos. 1725 and 1738
UNITED TELEPHONE SYSTEM Revisions to Tariff F.C.C. No. 5	Transmittal No. 208

ORDER

Adopted: December 15, 1988; Released: December 16, 1988

By the Chief, Common Carrier Bureau:

1. By the above-referenced transmittals, various local exchange carriers (LECs) have proposed revisions to their tariffs for access services to establish rates and charges for Special Access Individual Case Basis (ICB) High Capacity DS3 offerings.[1] The revisions are scheduled to become effective on dates ranging from December 19, 1988, to January 7, 1989.

2. On March 28, 1988, the Bureau released an Order initiating an investigation of a number of LECs' proposed ICB rates, designating for investigation issues concerning the LECs' continued use of ICB rates for DS3 offerings and establishing a pleading cycle.[2] The above-referenced transmittals raise the same issues as those transmittals subject to our *Designation Order*. Therefore, the instant transmittals will be subject to the outcome of that investigation. We also grant the LECs listed above special permission to advance the effective dates of these transmittals.

3. Accordingly, IT IS ORDERED that Ameritech Services, Tariff F.C.C. No. 2, Transmittal No. 241, Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company, Tariff F.C.C. No. 1, Transmittal No. 208, New England Telephone and Telegraph Company, Tariff F.C.C. No. 40, Transmittal No. 954, New York Telephone Company, Tariff F.C.C. No. 41, Transmittal No. 943, Pacific Bell Telephone Company, Tariff F.C.C. No. 128, Transmittal No. 1383, Southwestern Bell Telephone Company, Tariff F.C.C. No. 68, Transmittal Nos. 1725 and 1738, and United Telephone System, Tariff F.C.C. No. 5, Transmittal No. 208 are subject to the investigation instituted in CC Docket No. 88-136.

4. IT IS FURTHER ORDERED that the local exchange carriers listed in paragraph 3, *supra*, may file tariff revisions, to be effective on not less than one day's notice, in order to advance the effective dates of the above-referenced transmittals. For this purpose, we waive Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59, and assign Special Permission No. 88-618.

5. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the subject tariff revisions ARE SUSPENDED for one day.

6. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, all local exchange carriers subject to this investigation shall keep accurate account of all amounts received pursuant to Individual Case Basis rates for DS3 services which are the subject of such investigation.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief
Common Carrier Bureau

FOOTNOTES

[1] We note that while the LECs' filings also propose ICB rates for other services, this Order deals only with the proposed ICB rates for DS3 and DS3-equivalent services.

[2] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order Designating Issues for Investigation, 3 FCC Rcd 2582 (1988) (*Designation Order*). *See also* Supplemental Order Designating Issues for Investigation, CC Docket No. 88-136. DA 88-1593, released Oct. 17, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-17

In re Applications of

DONALD E. HILGENDORF File No. BPH-861020TA

TRAN BROADCASTING CORPORATION INCORPORATED File No. BPH-861020TB

For Construction Permit
for a New FM Station
Brookfield, Wisconsin

Appearances

David Tillotson and Susan A. Marshall, Esqs. (Arent, Fox, Kintner, Plotkin and Kahn) on behalf of Donald E. Hilgendorf; *Samuel Miller, Esq.* (Miller and Fields, P.C.) on behalf of Tran Broadcasting Corporation, Incorporated and *Paulette Laden, Esq.*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF
DEPUTY CHIEF ADMINISTRATIVE
LAW JUDGE JAMES F. TIERNEY

Issued: December 16, 1988; Released: December 28, 1988

PRELIMINARY STATEMENT

1. This proceeding concerns the mutually exclusive applications of Donald E. Hilgendorf (Hilgendorf) and Tran Broadcasting Corporation, Incorporated (Tran) for a construction permit for a new FM broadcast station, Channel 255A at Brookfield, Wisconsin.

2. The only issues specified in the *Hearing Designation Order* (DA 88-115), released February 16, 1988, were the standard comparative issues.[1] In a *Memorandum Opinion and Order*, FCC 88M-1669, released May 31, 1988, the issues were enlarged against Hilgendorf:

> To determine whether the proposed construction of Donald E. Hilgendorf has been approved by the FAA and, if not, whether Hilgendorf possesses the basic qualifications to become a Commission licensee.[2]

A prehearing conference was held April 18, 1988 and the hearing session was held on August 4, 1988. On August 4, 1988, the record was closed (Tr. 226). Later, on November 16, 1988, the record was opened to receive an exhibit of Hilgendorf addressed to the FAA issue and the record was again closed on that date. Earlier, on November 2, 1988, by *Memorandum Opinion and Order*, FCC 88M-3713, a Tran exhibit was received in evidence covering later discovered "stock subscription agreements."

FINDINGS OF FACT

Hilgendorf

3. Donald E. Hilgendorf is an individual applicant for the above-captioned facilities. He is a resident of Brookfield, Wisconsin (Hilgendorf Ex. 1, p. 2). If this application is granted, he will be both owner and General Manager of the proposed Brookfield station. In this capacity, he will supervise and be responsible for all aspects of the station's operations including, without limitation, the establishment of personnel policies and the hiring and firing of employees, the establishment and implementation of the station's programming format and commercial policies, and the management of the station's business and financial affairs (*Id.* at pp. 1-2).

4. Hilgendorf will work at the station on a full-time basis, at least 40 hours per week. He is currently self-employed as the owner of a florist shop and a video rental store. He has listed both of these businesses for sale so that he will be in a position to carry out his commitment to work full-time as the owner/manager of his proposed station. If his FM application is granted, Hilgendorf will resign from any employment position that he might take subsequent to the sale of his businesses, or if the businesses are not sold by then, he will hire a manager for them so that he will be able to devote his full time and attention to the supervision of the construction and the management of the station. He has no other businesses or financial interests which make substantial demands on his time (*Id.* at p. 1 and Tr. 121-122).

5. Hilgendorf has lived at 2840 Monterey Boulevard in Brookfield since 1975 (*Id.* at p. 2 and Tr. 129). From 1961 to 1975, he lived in Sussex, Wisconsin, which is within the primary service area of his proposed station. While living in Sussex, he was active in founding the Peace Lutheran Church in that community. After the Church was established in 1961, he was active in the affairs of the Church until 1975 in the following capacities: he served on the Church's Building Committee in 1963 and 1964 and on its Property Committee from 1964 to 1967; he was the Church's Sunday School Superintendent from 1962 and 1965; a member of the Church's Board of Elders from 1967 to 1975; Chairman of the Board of Elders in 1973 and 1974; and Vice-President of the Congregation from 1972-1975. In 1984, he was also active in the Kiwanis Club of Menomonee Falls, a community within the primary service area of his proposed station (*Id.* at p. 2).

6. Hilgendorf has no interest in any media of mass communication (*Id.*).

7. Hilgendorf also proposes the use of auxiliary power generators both at the studio site and transmitter site in the event of a public utility power outage (*Id.* at pp. 2-3).

Tran

8. Tran is authorized to issue 2,000 shares of common voting stock and 800 shares of non-voting stock, each class having no par value. Its officers, directors and stockholders are as follows:

Percentage of

Name and Residence	Office	ownership and Votes
Hal Nichol Wilwaukee, WI	President Director	51%
Donald Kohlhagen Muskego, WI	Vice-President Director	49%
Beverly Kohlhagen Muskego, WI	Secretary Director	0
Todd Nichol Wauwatosa, WI	Treasurer Director	0

Donald Kohlhagen and Beverly Kohlhagen are husband and wife. Hal Nichol is the father of Todd Nichol (Tran Ex. 1).

9. Neither Tran nor any of its principals has any ownership or other controlling interest in any other broadcast station, any CATV system, print publication, or any other medium of mass communications (Tran Ex. 1).

10. Hal Nichol will be the general manager of Tran's proposed Brookfield station, working full-time a minimum of 40 hours per week there. He will be in charge of all aspects of the proposed station's operation, including but not limited to, setting all station policies, hiring and firing personnel, and assuring compliance with all federal, state and local laws and regulations (Tran Ex. 3).

11. Hal Nichol's present residence is 10828 West Appleton Avenue, Milwaukee, Wisconsin, where he has lived since 1980. That residence is approximately one mile from Brookfield, and is within the 1 mV/m contour of Tran's proposed station (Tr. 216). His residences prior thereto, and with the appropriate dates, are as follows: Milwaukee, Wisconsin from 1934-1960, with the exception of the years 1954-56 in Karlsruhe, Germany, while serving in the U.S. Army; Clinton, Iowa from 1961-62; Menomonee Falls, Wisconsin from 1978-79; Northridge Lakes, Milwaukee from 1979-80. All of the above named residences except Clinton, Iowa and, of course, Karlsruhe, Germany are within the 1 mV/m contour of Tran's proposed station. Upon grant of Tran's application, he will move to Brookfield (Tran Ex. 3).

12. In 1960, after completing his Army service, Hal Nichol attended the Milwaukee School of Broadcasting and was graduated as program director of the school. From 1961-62, he was employed as a 7 PM-to-midnight air personality at Station KROS, Clinton, Iowa (Tran. Ex. 3).

13. In the latter part of 1962 Nichol formed Falls Broadcasting Corporation, of which he was president, director, and a 33% stockholder. Falls Broadcasting Corporation constructed Station WZMF, Menomonee Falls, Wisconsin, and put it on the air in July 1966. Nichol was the general manager. He retained his association with Station WZMF until 1968. From 1966-68 Nichol programmed the station with an emphasis upon news and information on behalf of local service groups and government. Nichol went to the four area high schools twice a week to prepare the students for an on-air talk show concerning topics of local and national interest. In 1968, he terminated his association with WZMF other than his 1/3 ownership. He divested that ownership in 1978, when the station was sold (Tran Ex. 3).

14. From 1969 to 1972, Nichol was news director and 7 PM-to-midnight air personality at Station WGLB, Port Washington Wisconsin. Subsequently, in 1972, he worked for WRIT/WFWO in Milwaukee, Wisconsin as an air personality, for a period of six months (Tran Ex. 3).

15. From January 1988 to the present, Nichol has been a vice president and director of Vanguard Service, Inc. of Wisconsin, located in Waukesha, Wisconsin, as an on-site worker on a part-time basis. He has no ownership interest in that company. Nichol now has a part-time job as a supervisor with J.C. Cleaners of Milwaukee, a commercial cleaning company. These positions will be terminated upon grant of Tran's application (Tran Ex. 3).

16. Since 1982, Nichol has been employed by Station WGLB as a part-time announcer. In the past, Nichol has talked at schools, interviewed children at a hospital, and the elderly at a nursing home before the Christmas holidays, all for rebroadcast. Recently, Nichol met with Brookfield (Wisconsin) Mayor Kathleen Bloomburg to discuss community affairs, and also with the Brookfield Police Chief Jerome Wolff to discuss continuing efforts to combat drug abuse and teen suicide (Tran Ex. 3).

17. Donald F. Kohlhagen will serve as sales manager of Tran's proposed station, working full time, a minimum of 40 hours per week. He will be in charge of all sales activities of the station, including but not limited to, establishing all station policies with respect to sales, setting rates for advertising, creating promotional campaigns, and hiring and firing sales personnel. In addition, as part owner, officer, and director, Kohlhagen will be actively involved in all other aspects of station operation, e.g., programming, business planning, public relations, etc., which will be primarily Nichol's responsibility (Tran Ex. 3).

18. Kohlhagen has been a resident of Muskego, Wisconsin, residing at S70 W13403 Fennimore Lane since March 1982. This residence is within the 1 mV/m contour of Tran's proposed station (Tran. Ex. 4). Upon grant of the Tran application he proposes to move to Brookfield. From 1972-75 he resided in New Berlin, Wisconsin. From 1975-77 he lived in Muskego and from 1977-82 in West Allis, Wisconsin. His residences in Muskego, West Allis and New Berlin were within the 1 mV/m contour of the proposed Tran station (Tran Ex. 2).

19. From July 1979 to December 1980, Kohlhagen was employed full-time by WBKB Radio, West Bend, Wisconsin, as an announcer and sales representative. From December 1980 to September 1984, he as employed on a part-time basis by WGLB Radio, Port Washington, Wisconsin. His duties there included announcing, commercial sales representative and copy writer, including sports programs (Tran. Ex. 2).

20. Since September 1984, Kohlhagen has been employed by Wide Pontiac/Cadillac, Milwaukee, as sales representative in wholesale and retail automotive parts. Upon grant of Tran's application he will resign this position (Tran Ex. 2).

21. Kohlhagen's civic activities have included membership in St. Leonard's Church near Muskego, Wisconsin, and its associated PTA, from 1986 to date, during which time he attended monthly meetings (Tr. 144-145, Tran Ex. 2).

22. Tran will install auxiliary power generation equipment at the transmitter and studio locations to enable the station to remain on the air in the event of a commercial power outage (Tran Ex. 1).

ULTIMATE FINDINGS AND CONCLUSIONS

23. An earlier disabling issue affecting Hilgendorf, as noted above, concerning his antenna site and his FAA consequence has now been resolved in his favor under *Memorandum Opinion and Order*, FCC 88M-3906, *supra*. That being so, the remaining matters to be determined are those issues originally designated addressed to the comparative postures of the parties under the *Policy Statement on Broadcast Proceeding* (1 FCC 20393 (1965)) (Policy Statement) and prevailing precedent derived therefrom.

Diversification

24. Neither, Hilgendorf nor Tran has a cognizable interest in the mass media; hence, no credit or demerit can be attributed to either party.

25. Thus, those factors under the evidence of record comprehended under the Best Practicable Service to the Public (*Policy Statement* at 394), customarily identified as quantitative or qualitative attributes of the contestants at bar need to be addressed; in turn, these attributes are generally described under Integration of Ownership and Management and other cognizable enhancing factors.

Integration of Ownership and Management - Hilgendorf and Tran

26. While Tran argues that Hilgendorf would not be entitled to full 100% integration credit based on Hilgendorf's lack of broadcast experience and his reliance on his proposed program director, Tom Snyder, as his "right hand man," the evidence suggests otherwise.

27. As noted by Hilgendorf, broadcast experience is not a prerequisite for integration credit (*Policy Statement* at 396). Also, the test for determining whether a third person is a "real-party-in-interest," as Tran has alleged, is whether that person has an ownership interest in, or is or will be, in a position to actually or potentially control the operation of the station. *WLOX Broadcasting Co. v. Federal Communications Commission*, 260 F. 2d 712 (D.C. Cir. 1958); *Angeles Broadcasting Network*, 61 RR 2d 480, 488 (1986). No such showing has been made here. No evidence appears demonstrating that Snyder has any present or future ownership interest in the Brookfield application or any stake in the affairs of the proposed licensee.

28. Beyond financial interests "extrinsic" evidence must also appear that a third party's leverage has manifested itself in the actual operation of the applicant in order to find *de facto* control. *See , e. g., Seven Hill Television Co.*, 2 FCC Rcd 6867 (Rev. Bd. 1987). Again, no such "extrinsic" evidence of control has been demonstrated here. Snyder's possession of greater broadcasting experience and knowledge is not evidence of control. Snyder's advice and assistance in preparing the Brookfield application is not evidence of control. Snyder's activities, which included his assistance in the preparation of the Brookfield application, contacting engineering and legal counsel and the selection of a proposed site, were limited to the formation and initial prosecution of the Brookfield application, the evidence sustains; and such activities by a non-voting principal of an applicant can be deemed to have little bearing on the integration credit to be awarded to the applicant's integrated voting principal. Thus, Hilgendorf would be entitled to 100% integration credit and it is so found.

29. Hilgendorf is entitled to enhancement credit of primary importance for his long-time residence in the proposed community of license. His hardly perceptible civic participation, (thus not of cognizable value), is limited to the service area of his proposed station.

30. Tran's qualitative enhancements include equally barely cognizable civic participation, but, of moderate credit, previous broadcast experience. Yet, the *Policy Statement*, *supra*, notes "[p]revious broadcast experience, while not so significant as local residence, also has some value when put to use through integration of ownership and management" (*Policy Statement* at 396). Thus, the attribution is as said "some value." And Tran appears to concede "[n]either applicant is entitled to a comparative preference for civic attributes" (Tran Proposed Findings at 11).

31. The enhancement credit to be accorded Hilgendorf is principally for long-time residence in the proposed community of license, some 13 years, and as with Tran, little or no cognizable civic participation, largely as a member of his Lutheran parish, in the service area albeit but "one mile from Brookfield." Tran can be also credited with residence within the service area and Nichol's and Kohlhagen's broadcast experience. Although both Nichol and Kohlhagen propose to move to Brookfield, their proposal to move is less significant than Hilgendorf's continual residence in Brookfield for the last 13 years. *Policy Statement*, *supra*, at p. 396. Broadcast experience, as an enhancement credit, is but of "minor" importance (*Id.*) and cannot overcome significant credit awarded for long-time local residence. *Armando Garcia*, 3 FCC Rcd 1065, 1068, 64 RR 2d 1005, 1010 (Rev. Bd. 1988), *rev. denied*, FCC 88-258 (August 8, 1988).

32. In these oftentimes close comparative cases, the choice comes to a narrow one, indeed. Here, under the evidence, after post-trial granted prayer for relief to both parties, they would be virtually in a dead heat, but for Hilgendorf's perceptible, thus, creditable, long-term local residence in the proposed community of license. Under the evidence and abiding precedent, Hilgendorf must prevail on that singular factor, and it is so concluded.

Accordingly, the public interest so warranting, the application of Donald E. Hilgendorf for the captioned facilities at Brookfield, Wisconsin may be AND IS HEREBY GRANTED; that being so, the application of Tran Broadcasting Corporation, Incorporated for those same facilities must be AND IS HEREBY DENIED.[3]

IT IS SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION

James F. Tierney
Deputy Chief Administrative Law Judge

FOOTNOTES

[1] In the *Hearing Designation Order*, *supra*, the Commission stated that the areas and populations which would receive FM service of 1 mV/m or greater intensity from each party's proposal, together with the availability of other primary aural services in such areas, would be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants. The parties have stipulated that no substantial differences exist in the areas and populations to be served by each applicant. (Tr. 74-75 and Stipulation filed jointly by both applicants with the FCC on June 7, 1988.) Consequently, no evidence was submitted concerning this matter.

[2] On September 21, 1988, the FAA issued a further determination concerning Hilgendorf's site. However, it failed to make a final determination as to whether the proposed tower height would be a hazard to air navigation and the FAA invited Hilgendorf to request further study of this matter. Such further study has been requested. By *Memorandum Opinion and Order*, FCC 88M-3906, released November 16, Hilgendorf's FAA issue was resolved in his favor.

[3] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d) (47 CFR 1.276(d)).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-378

In the Matter of

Amendment of Section 73.202(b), RM-5927
Table of Allotments,
FM Broadcast Stations.
(Saint Robert, Missouri)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: November 16, 1988; Released: December 28, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the Petition for Reconsideration filed by Kevin A. Barton (petitioner), of the *Report and Order*, 3 FCC Rcd 3183 (1988), which dismissed a petition for rule making because of lack of interest.[1]

2. Petitioner submitted a petition for rule making requesting the allotment of FM Channel 243A to Saint Robert, Missouri, as that community's first FM broadcast service. A Notice of Proposed Rule Making was adopted on August 25, 1987, indicating comments should be filed on or before November 16, 1987. According to petitioner, supporting comments were timely filed but apparently never received by the Commission staff responsible for acting on petitioner's proposal. Therefore, the *Order* dismissed the petition for lack of interest. Petitioner now requests that we accept his late-filed comments and allot Channel 243A to Saint Robert, Missouri.

3. We believe that the public interest would be served by allotting Channel 243A to Saint Robert, Missouri, as an interest has been expressed in providing the community with its first local FM service. Channel 243A can be allotted to Saint Robert, Missouri, in compliance with the minimum distance separation requirements of the Commission's Rules.[2] Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 13, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Saint Robert, Missouri	243A

4. The window period for filing applications will open on **February 14, 1989,** and close on **March 16, 1989.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Public Notice of the Petitioner for Reconsideration was given on August 22, 1988 (Report No. 1744).

[2] The coordinates for Channel 243A at Saint Robert are 37-49-41 and 92-10-39.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-51

In the Matter of

Amendment of Section 73.202(b),	RM-6076
Table of Allotments,	RM-6265
FM Broadcast Stations.	
(Evans, Martinez and Warrenton, Georgia)[1]	

FURTHER NOTICE OF PROPOSED RULE MAKING AND MEMORANDUM OPINION AND ORDER

Adopted: November 18, 1988; Released: December 28, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Evans Broadcasters (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 971 (1988), proposing the allotment of Channel 299A to Evans, Georgia, as the community's first local service. Petitioner and Bible Broadcasting Service, Inc. (Bible Broadcasting) filed comments expressing their intention to apply for the channel, if allotted. In addition, Columbia County Broadcasters (Columbia), licensee of Station WMTZ, Martinez, Georgia, and Harold Kinsley (Hinsley) filed joint comments and counterproposals.[2] Columbia and Hinsley oppose the allotment of Channel 299A to Evans and instead propose the substitution of Channel 299C2 for Channel 232A at Martinez, the modification of Columbia's license for Station WMTZ to specify the higher powered channel, and the allotment of Channel 232A to Warrenton, Georgia, as that community's first local FM service. Columbia and Hinsley each stated their intention to apply for Channel 299C2 at Martinez and Channel 232A at Warrenton, respectively.

2. Columbia argues that petitioner's request cannot be granted since Evans does not meet the Commission's criteria for establishing community status. It notes that allotments must be made to "communities" and that this requirement is presumptively met if the community is incorporated or listed in the census. However, absent such a listing, parties desiring the allotment of a channel are required to supply information sufficient to establish that the place meets the Commission's definition of a community, that is a geographically identifiable population grouping. *See, Revision of FM Assignment Policies and Procedures*, 51 RR 2d 807, 816 (1982). In this case, Columbia states that Evans is not listed in the 1980 U.S. Census as either an incorporated or "census designated place," but only as a "county subdivision" of Columbia County. Thus, unless petitioner submits information demonstrating the qualifications of Evans as a community, Columbia maintains that Channel 299A cannot be allotted there.

3. Columbia and Hinsley go on to state that the adoption of their counterproposals would serve the public interest since it could enable Station WMTZ to upgrade its facilities while also permitting the provision of a first local service to Warrenton, which has a population of 2,172 persons and which is also the seat of Warren County.

4. Based upon a review of the pleadings before us, we are unable to determine that Evans is a community for allotment purposes since it is neither listed in the 1980 U.S. Census nor incorporated. While the Commission inadvertently failed to raise this issue in the *Notice of Proposed Rule Making*, petitioner was aware of the need to provide community data since it was served with a copy of Columbia's comments. However, neither the petitioner nor Bible Broadcasting filed reply comments addressing either the counterproposal or the question concerning Evans status as a community. Therefore, we will deny petitioner's request for the allotment of Channel 299A to Evans.

5. Even though we have decided that Channel 299A cannot be allotted to Evans, we are unable to grant Columbia's request to substitute Channel 299C2 for Channel 232A at Martinez and modify its license at this time. Section 1.420 of the Commission's Rules stipulates that a station may be upgraded on a non-adjacent higher powered channel only where no other party expressed an interest in use of the channel or if there is an additional equivalent channel available for use by such other interested parties. In this case, the Public Notice announcing the filing of Columbia's counterproposal did not state that it sought modification of its license for Station WMTZ to the Class C2 channel and did not advise interested parties that they should file competing expressions of interest in reply comments. In addition, we are unable to determine that there is available an additional higher powered channel for use by any other interested parties. Therefore, we are issuing this *Further Notice* to provide such an opportunity. However, we will not accept counterproposals to the use of Channel 299C2 at Martinez since an opportunity to seek the allotment of a channel in the area has already been provided by the *Notice* proposing the Evans allotment.

6. The allotment of a channel to Warrenton, however, need not be delayed by this *Further Notice*. A staff engineering study has determined that Channel 226A can be allotted to Warrenton without requiring any other changes in the Table of Allotments. Therefore, the allotment at Warrenton will be the subject of a separate First Report and Order.

7. Based on the above discussion, we believe the public interest would be served by proposing the allotment of Channel 299C2 to Martinez, Georgia, since it could provide the community with its first wide coverage area FM service. We also propose to modify Columbia's license for Station WMTZ to specify operation on Channel 299C2 if no additional expression of interest in use of the channel is expressed, or if there is an additional equivalent channel for their use. Channel 299C2 can be allotted to Martinez in compliance with the Commission's minimum distance separation requirements with a site restriction of 25.3 kilometers (15.7 miles) northwest to avoid a short-spacing to Station WKQB, Channel 298C, St. Georgia, South Carolina, and to the proposed allotment of Channel 296A at Waynesboro, Georgia (MM Docket 88-223, 3 FCC Rcd 3111 (1988)).[3]

8. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

City	Channel No. Present	Proposed
	Option I	
Martinez, Georgia	232A	299C2

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

10. Interested parties may file comments on or before **February 21, 1988,** and reply comments on or before **March 8, 1989**and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Lawrence J. Bernard, Jr., Esq.
Ward & Mendelsohn, P.C.
1100 - 17th Street, N.W., Suite 900
Washington, D.C. 20036
(Counsel to Columbia)

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

12. IT IS ORDERED, That the request of Evans Broadcasters for the allotment of Channel 299A to Evans, Georgia (RM-6076), IS DENIED.

13. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments,

reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The communities of Martinez and Warrenton have been added to the caption.

[2] Public Notice of the filing of the counterproposal was given on April 27, 1988, Report No. 1726.

[3] The coordinates for this allotment are North Latitude 33-40-30 and West Longitude 82-16-14.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-44

In the Matter of

Amendment of Section 73.606(b), RM-6063
Table of Allotments,
Television Broadcast Stations.
(Goldfield, Nevada)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 16, 1988; Released: December 28, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Sarkes Tarzian, Inc. (petitioner), licensee of Station KTVN, Channel 2, Reno, Nevada, the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 884 (1988), proposing the substitution of VHF television Channel 7- for Channel 2- at Goldfield, Nevada. Comments were filed by the petitioner and by KTVU, Inc. (KTVU), licensee of Station KTVU, Oakland, California.

2. Petitioner has filed an application to relocate Station KTVN's transmitter from Red Peak to McClellan Peak so as to improve its off-the-air service to Carson City, Nevada (BPCT-860507KG). It requested the Goldfield substitution so as to remove a short-spacing between that allotment, which is unused and unapplied for, and the use of the McClellan Peak site by Station KTVN. KTVU does not oppose the Goldfield substitution. However, it points out that the Goldfield allotment is not the only bar to granting petitioner's pending application since it would not negate the 13.4 kilometer short-spacing to its Oakland station. Therefore, it notes that grant of petitioner's application is not certain even if the Goldfield substitution is made.

3. Petitioner contends that the public interest would be served by substituting Channel 7- for Channel 2- at Goldfield, stating that the community would retain a VHF channel for future use. In addition, it believes that the substitution of channels would enhance the prospect of a grant of its application since it would eliminate its need for a short-spacing waiver with respect to the Goldfield allotment. Petitioner restates its belief that the relocation of Station KTVN's transmitter would enable it to improve off-the-air service to Carson City, Nevada, and other areas.

4. We believe the public interest would be served by substituting VHF TV Channel 7- for Channel 2- at Goldfield, Nevada, since it may allow increased service from Station KTVN to the area surrounding Reno, including Carson City, if petitioner's transmitter site change application is granted. While this action does not negate the short-spacing to Station KTVU at Oakland, California, or address the merits of its waiver request in connection with that station, the Goldfield substitution does remove one of the short-spacing problems faced by petitioner. Channel 7- can be allotted to Goldfield in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 13, 1989**, the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Goldfield, Nevada	7-

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 37-42-24 and West Longitude 117-14-06.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-160

In the Matter of

Amendment of Section 73.202(b), RM-6202
Table of Allotments,
FM Broadcast Stations.
(Bayard, Nebraska)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 16, 1988; Released: December 28, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Charles Ellis (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 2223 (1988), proposing the allotment of Channel 280C to Bayard, Nebraska, as the community's first local FM service. Petitioner filed comments supporting the allotment and reiterating his intention to apply for the channel. However, he later filed a letter withdrawing his interest in use of the channel. Tracy Corporation (Tracy), licensee of Station KMOR(FM), Scottsbluff, Nebraska, filed reply comments opposing the allotment.

2. As stated in the *Notice*, a showing of continuing interest is required before a channel will be allotted. It is the Commission's general policy to refrain from making allotments to a community absent an expression of interest. Therefore, since there has been no such interest expressed here, we will dismiss the petitioner's proposal. In light of this decision, we need not discuss Tracy's opposition to the allotment.

3. Accordingly, IT IS ORDERED, That the petition of Charles Ellis requesting the allotment of Channel 280C to Bayard, Nebraska, IS HEREBY DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-78

In the Matter of

Amendment of Section 73.202(b), RM-6185
Table of Allotments,
FM Broadcast Stations.
(Leland, North Carolina)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 16, 1988; Released: December 28, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Leland Broadcasting Group (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 1079 (1988), proposing the allotment of Channel 231A to Leland, North Carolina, as the community's first local FM service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No oppositions to the proposal were received. Channel 231A can be allotted to Leland in compliance with the Commission's minimum distance separation requirements with a site restriction of 8.6 kilometers (5.3 miles) southwest to avoid a short-spacing to unoccupied and unapplied for Channel 229A at Wrightsville Beach, North Carolina, and to Station WZKB, Channel 232A, Wallace, North Carolina.[1]

2. We believe the public interest would be served by allotting Channel 231A to Leland, North Carolina, since it could provide the community with its first local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 13, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Leland, North Carolina	231A

3. The window period for filing applications will open on **February 14, 1989,** and close on **March 16, 1989.**

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 34-11-09 and West Longitude 78-05-13.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-254

In the Matter of

Amendment of Section 73.202(b), RM-6219
Table of Allotments,
FM Broadcast Stations.
(La Monte, Missouri)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 18, 1988; Released: December 28, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 3173 (1988), issued in response to a petition filed by Johnson County Broadcasters, Inc. (petitioner). The *Notice* proposed the allotment of FM Channel 246A to La Monte, Missouri, as that community's first FM broadcast service. Petitioner filed comments in support of the *Notice* and stated its intention to apply for the channel. No other comments were received.

2. Channel 246A can be allotted to La Monte, Missouri, in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules provided there is a site restriction 7.4 kilometers (4.6 miles) east of the community.[1] The site restriction will prevent a conflict with Station KXTR, Channel 243C2, Kansas City, Missouri.

3. In view of the fact that the proposed allotment could provide a first FM broadcast service to La Monte, we believe the public interest would be served by a grant of the petitioner's request.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 13, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
La Monte, Missouri	246A

5. The window period for filing applications will open on **February 14, 1989,** and close on **March 16, 1989.**

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 246A at La Monte are 38-45-36 and 93-20-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-451

In the Matter of

Amendment of Section 73.202(b),	RM-5631 RM-5695
Table of Allotments,	RM-5639 RM-5763
FM Broadcast Stations.	RM-5647 RM-6238
(Cordova, Demopolis,	RM-5655 RM-6239
Evergreen, Hartselle, Linden,	RM-6240
Marion, Sheffield, Trinity,	
and Tuscaloosa, Alabama;	
Mississippi)	

ERRATA

Released: December 28, 1988

On November 29, 1987, the Commission's Mass Media Bureau released a *Report and Order* (DA 88-1812) in the above-captioned proceeding. Paragraph 7 thereof is hereby corrected with respect to the site restriction placed on the allotment of Channel 280C2 at Columbus, Mississippi, to reflect its use at least 23.5 kilometers northeast of the community rather than 23.2 kilometers northeast. Additionally, footnote 32 is revised to read as follows:

> Reference coordinates used for Channel 280C2 at Columbus, Mississippi, are 33-37-00 and 88-12-25.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-2

In the Matter of

Amendment and Clarification of Part 69
Rules Governing the National Exchange
Carrier Association

ERRATUM

Released: December 29, 1988

On November 18, 1988, the Commission released a Report and Order in this proceeding, FCC 88-363. In Appendix A of this Report and Order, Section 69.603 was inadvertently titled incorrectly and Section 69.603(i)(6) inadvertently misstated the relevant category of expenses. Additionally, in specifying the charges associated with the common line tariffs, the Special Access Surcharge was inadvertently omitted from in Section 69.603(h) and (i)(5) and (i)(6). Accordingly, the following corrections are made to Appendix A of the Report and Order.

1. Section 69.603 is amended by adding new paras. (h) and (i) to read:

(h) The association shall divide the expenses of its operations into two categories. The first category (Category I Expenses) shall consist of those expenses that are associated with the preparation, defense, and modification of association tariffs, those expenses that are associated with the administration of pooled receipts and distributions of exchange carrier revenues resulting from association tariffs, those expenses that are associated with association functions pursuant to subsections 69.603 (c)-(g), and those expenses that pertain to Commission proceedings involving Subpart G of Part 69 of the Commission's rules. The second category (Category II Expenses) shall consist of all other association expenses. Category I Expenses shall be sub-divided into three components in proportion to the revenues associated with each component. The first component (Category I.A Expenses) shall be in proportion to the Universal Service Fund and Lifeline Assistance revenues. The second component (Category I.B Expenses) shall be in proportion to the sum of the association End User Common Line revenues, the association Carrier Common Line revenues, the association Special Access Surcharge revenues, the Long Term Support payments and the Transitional Support payments. The third component (Category I.C Expenses) shall be in proportion to the revenues from all other association interstate access charges.

* * *

(i)(5) No distribution to an exchange carrier of revenues from association End User Common Line, or Carrier Common Line charges, Special Access Surcharges, or Long Term Support or Transitional Support payments shall include adjustments for association expenses other than Category I.B Expenses.

(i)(6) No distribution to an exchange carrier of revenues from association interstate access charges other than End User Common Line and Carrier Common Line charges and Special Access Surcharges shall include adjustments for association expenses other than Category I.C Expenses.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Puerto Rico Telephone Company's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs	AAD 7-1701

MEMORANDUM OPINION AND ORDER

Adopted: December 16, 1988; Released: December 29, 1988

By Chief, Common Carrier Bureau:

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I. INTRODUCTION AND BACKGROUND

1. On August 24, 1987, Puerto Rico Telephone Company (PRTC) filed a cost allocation manual pursuant to the *Joint Cost Order* [1] governing the accounting separation of PRTC's regulated and nonregulated costs. Consistent with the requirements of the *Joint Cost Order*, PRTC implemented the manual on January 1, 1988, concurrent with the implementation of the revised Uniform System of Accounts (USOA).[2] The manual includes a description of PRTC's nonregulated activities, a description of activities PRTC treats as incidental to regulated activities for accounting purposes, information on affiliate transactions, information on employee time reporting, and information describing how each revised USOA account is allocated between regulated and nonregulated activities.

2. One party filed comments on PRTC's manual, and PRTC filed a reply. [3] In addition to reviewing the pleadings, we have conducted our own review of the PRTC manual to determine its consistency with the Commission's rules and policies. We have concluded that while the PRTC manual is deficient in some respects, its format and content generally provide the Common Carrier Bureau (Bureau) with a sufficient understanding of the proposed cost allocation procedures to permit us to make an informed judgment as to the ability of the manual to discourage cross subsidy. We conclude that, overall, PRTC's manual provides sufficient assurance against the misallocation of costs and revenues to permit PRTC to continue to apply its manual pending submission of a revised manual that meets all Commission requirements.

3. We require that PRTC specify in greater detail the procedures it intends to follow in apportioning the costs and revenues of regulated and nonregulated activities, and, in certain instances, that PRTC correct ambiguities and omissions in its manual. We require PRTC to submit revisions to its manual, and we shall solicit public comment on them. Any revisions to the manual that result from the instant Order should be made effective retroactive to January 1, 1988, to the extent possible.[4] We therefore approve PRTC's cost allocation manual subject to a number of conditions and requirements for the submission of further information.

4. This Order is divided into three substantive sections. Section II discusses general issues, including issues regarding the portions of the manual that relate to nonregulated activities, incidental activities, affiliate transactions, and employee time reporting. Section III discusses issues raised in connection with the proposed apportionment methods and specific accounts. Section IV discusses certain procedural requirements for updating cost allocation manuals.

II. GENERAL ISSUES

A. Overall Sufficiency of the Manual

5. The *Joint Cost Order* listed five types of information that must be included in cost allocation manuals: (a) a description of each nonregulated activity; (b) a list of all the activities the company now accords incidental accounting treatment, and the justification for treating each as incidental; (c) a chart showing all corporate affiliates; (d) a statement identifying affiliates that engage in or will engage in transactions with the carrier entity and describing the nature, terms and frequency of such transactions; and (e) for each USOA account and subaccount, detailed specifications of the cost categories (or cost pools) to which amounts in the account or subaccount will be assigned, and of the allocation method for each cost category (or pool).[5] In addition, the manuals must describe the methods used to teach, monitor, and enforce accurate time reporting, as well as the methods for capturing and allocating the costs of nonproductive time.[6]

6. Generally, we find that PRTC's manual contains cost accounting procedures that are adequate to meet our requirements and that are at a level of detail necessary for us to conclude that the manual's procedures will discourage cross subsidy. Moreover, we believe that, overall, PRTC's manual will provide an adequate basis for Commission audits. We note, however, that a number of ambiguities and omissions exist in the manual that must be

corrected by the submission of additional information and amendments. We do not believe, however, that these omissions or other defects in PRTC's manual require its rejection. Instead, we believe the best procedure is to permit PRTC to continue to implement its manual, while requiring it to make revisions. Our approval of PRTC's manual, therefore, is conditioned upon the timely submission of a revised manual responsive to the matters discussed in this Order.

B. Nonregulated Activities

7. The PRTC manual provides the requisite description of PRTC's nonregulated activities.[7] PRTC lists six types of nonregulated activities that it offers: (1) Investment in customer premises equipment (CPE), including single-line sets, key systems, Private Branch Exchanges (PBXs), and CPE associated with cellular mobile radio, radio paging, and Digital Termination Equipment; (2) Marketing, installation and maintenance of all CPE; (3) Installation and maintenance of inside wire; (4) Customer-specific construction projects undertaken on a contract basis;[8] (5) Packet switching; and (6) Voice message service. Our review of these activities confirms that PRTC has met the requirements of the *Joint Cost Order* on this matter.

C. Incidental Activities

8. PRTC's manual also provides, as required, a list of nonregulated activities that it offers on an incidental basis to regulated activities.[9] In the *Joint Cost Order*, the Commission permitted carriers to account for incidental activities as regulated activities, provided that each of the activities meets the following quantitative and qualitative tests: (a) the activity must be an outgrowth of regulated operations; (b) it cannot constitute a separate line of business; (c) it must have traditionally been treated as incidental for accounting purposes; and (d) the revenues from all of a carrier's incidental activities must not exceed one percent of its total revenues.[10]

9. PRTC list four activities which it considers incidental: (1) Building rental to third parties; (2) Pole attachment rental; (3) Conduit rental; and (4) Antenna rental.[11] PRTC states in its manual that these services meet the requirements for incidental activities established in the *Joint Cost Order*, and based on our review of this section, we are satisfied that it has met those requirements.

D. Affiliate Transactions

10. The *Joint Cost Order* establishes specific rules governing the provision of assets and services to and from affiliates. These rules were adopted in order to discourage carriers from avoiding the cost allocation rules through affiliate transactions. For example, if a carrier wished to cross subsidize a nonregulated activity, it could, in the absence of the affiliate transaction rules, engage in that activity through a separate but affiliated company which would receive assets or services from the carrier at prices less than the carrier's fully distributed costs. The affiliate transaction rules specify the valuation standards that will be applied in accounting for transactions between a carrier and its affiliates. Those rules vary depending upon whether the transaction involves assets or services.[12] The *Joint Cost Order* also required that carriers include in their cost allocation manuals "[a] statement identifying affiliates that engage in or will engage in transactions with the carrier entity and describing the nature, terms, and frequency of such transactions."[13]

11. PRTC states in its manual that it has no affiliate transactions because it " . . . has no affiliated entities of any sort."[14] In support of this position, PRTC states that the Puerto Rico Telephone Authority (PRTA), the government entity which owns the stock of PRTC, also owns other ventures, but that these other ventures are not legally or operationally affiliates of PRTC.[15] We disagree with PRTC on this matter. First, as the "Corporate Structure" chart contained in PRTC's manual shows,[16] PRTC is a subsidiary of PRTA, as are three other entities: Diversified Informations Systems, Corp. (DISCORP); Telefonica Hispanoamericana; and Puerto Rico Public Broadcasting Corp. (WIPR). All of these entities are affiliated with each other, as well as with the parent, PRTA, and as the manual notes, PRTC has transactions with these entities.[17] Second, since PRTC is owned by a government entity, it is also a government entity, and thus is affiliated with all other government entities in the Puerto Rico government. Accordingly, in revisions to its manual, PRTC is directed to list all affiliates, both within the PRTA and in other areas of the Puerto Rico government, which it engages in or will engage in transactions, and describe the nature, terms and conditions of those transactions.

E. Employee Time Reporting

12. The *Joint Cost Order* permits carriers to select from among several methods of recording employee time. The Commission reasoned that, since the use of wages and salaries would serve as an important technique in the allocation of costs, it was important that carriers use accurate methods of recording employee time. The Commission further found that no one time reporting system would provide accurate results in all situations. Carriers are therefore free to propose the use of positive time reporting or exception time reporting, or to develop special studies to keep track of employee time. The *Joint Cost Order* also required that carriers include in their manuals a description of the methods used to teach, monitor and enforce accurate time reporting. In addition, carriers must describe methods used to capture the costs of nonproductive time and the methods used to allocate those costs.[18]

13. In its cost manual, PRTC proposes using two time reporting methods: positive time reporting and survey time reporting.[19] There were no comments filed regarding PRTC's time reporting procedures and methods.

14. Our review of PRTC's treatment of employee time reporting shows that PRTC must provide additional information on two matters. First, while PRTC identifies groups of employees to which various time reporting methods apply, it gives no indication of whether the time reporting methods apply to support staff and management of these groups. PRTC must amend its manual to clarify this matter. Second, PRTC must provide more information on its procedures for capturing nonproductive time. While its manual lists various types of nonproductive time,[20] it does not provide the details of its procedures for capturing this time. PRTC must amend its manual to provide this information.

F. Joint Use of Network Plant

15. In the *Joint Cost Order*, the Commission established that jointly-used network plant (central office equipment and outside plant) must be allocated based on a forecast of the peak relative nonregulated usage of the plant over its entire depreciable life. The Commission elected to adopt a forecasted use approach in order to reflect the nature of capital investment decisions, *i.e.*, that investment decisions are made in anticipation of future use.[21] On reconsideration, the Commission reduced the length of the forecast period to three years in recognition of the practical difficulties of forecasting relative use over a lengthy depreciation period.[22]

16. PRTC states in its manual that common use of central office or outside plant investment by regulated and nonregulated services is not currently planned, but when such investment appears probable, it will revise its manual to use a forward-looking allocator.[23] In its comments, IBM notes that although PRTC does not currently intend to use network plant jointly, and will provide transmission services used in its own nonregulated activities at tariffed rates, it should be required to revise its cost manual to implement the principle of allocation of investment risks before it begins to share investments.[24] In its reply, PTRC reiterates that it is not providing any nonregulated service that requires the joint use of either central office or outside plant investment, but that when a service arises that will involve such common usage, it will adopt a forward-looking allocator as mandated by the Commission.[25] We agree with PRTC on this issue. We note however, that it must amend its manual to provide for forward-looking allocators when PRTC's three-year forecasts of future operations indicate a planned sharing of network plant for regulated and nonregulated services.

III. ACCOUNT - BY - ACCOUNT ANALYSIS

17. PRTC's manual describes in two places the methods it proposes to use to derive cost pools and to apportion costs between regulated and nonregulated activities. First, PRTC provides a narrative description of its cost apportionment bases.[26] Second, PRTC provides apportionment information in table format.[27] Our review of the manual has identified several issues that PRTC must resolve. Before discussing these specific account issues, however, we identify several required accounts that are not included in PRTC's manual.

A. Accounts To Be Added

18. In the *Joint Cost Order*, the Commission required that carriers submit allocation proposals for each USOA account and subaccount.[28] Since that requirement would have mandated the allocation of amounts that are not used in the jurisdictional separations and interstate ratemaking processes, the *ARMIS Order* eliminated the allocation requirement for particular accounts.[29] Appendix C to the *ARMIS Order* listed for the first time the particular USOA accounts and subaccounts that would be subject to joint cost reporting. In addition, the Commission required carriers to report on six additional accounts used in the interstate ratemaking process. These additional accounts are: Account 2004 - Telecommunication Plant Under Construction-Long Term; Account 2441 - Conduit Systems; Account 4120 - Other Accrued Liabilities; Account 4360 - Other Deferred Credits; Account 5050 - Customer Premises Revenue; and Account 7150 - Gains and Losses From Disposition of Land and Artworks.[30]

19. Because the list released in the *ARMIS Order* was not available until after PRTC filed its manual, the manual omits many accounts contained on that list. The manual also omits four of the six accounts listed above: Account 4120 - Other Accrued Liabilities; Account 4360 - Other Deferred Credits; Account 5050 - Customer Premises Revenues; and 7150 - Gains and Losses From Disposition of Land and Artworks. We direct PRTC to amend its manual to include allocation proposals for each of the omitted accounts. If, in making these revisions, PRTC finds that there are accounts for which it has nothing to report, it must list these accounts in its manual and indicate that it has nothing to report.

B. Specific Accounts

Account 1439 - Deferred Charges and Account 4120 - Other Accrued Liabilities

20. PRTC does not propose allocation methods for these accounts. In the revisions to its manual, which are to include such allocation methods, we direct PRTC to include a specific cost pool for each of these accounts. For Account 1439, PRTC must separately provide a cost pool reflecting the cost of compensated absences. For Account 4120, a cost pool shall be established for liabilities related to compensated absences.

Account 2112 - Motor Vehicles

21. PRTC proposes to apportion the costs to four cost pools in this account based on "the results of a study performed by PRTC to determine vehicle use." However, PRTC does not describe the study. We direct PRTC to include a description of this study in its revised manual.

Account 2122 - Furniture and Account 2123 - Office Equipment

22. PRTC proposes to establish all four cost pools in Account 2122 and four of five cost pools in Account 2123 on the basis of "studies." PRTC does not, however, describe these studies. In its revisions, PRTC must describe these studies and state how they are used to establish these cost pools.

Account 6362 - Other Terminal Equipment Expense

23. PRTC proposes two cost pools for this account, one for preemptively deregulated CPE and one for non-CPE. The former will be assigned directly to nonregulated activities and the latter will be assigned directly to regulated activities. Expenses related to the installation and maintenance of inside wire should be included in this account, but it is unclear from PRTC's manual that this is the case. To clarify this matter, we require PRTC to establish a separate cost pool for inside wire expenses and directly assign the costs in that pool to nonregulated activities.

Account 6512 - Provisioning Expense

24. PRTC will apportion the expenses in this account to regulated and nonregulated activities on the basis of the general allocator. PRTC must clarify whether construction and plant specific costs are cleared from this account prior to the apportionment process.

Account 6534 - Plant Operations Administrative Expense and Account 6535 - Engineering Expense

25. PRTC must clarify whether construction related costs are cleared from these accounts before the apportionment to nonregulated activities occurs.

Account 6711 - Executive Expense and Account 6712 - Executive Planning Expense

26. PRTC proposes to apportion all of the expenses in Account 6711, and the expenses in the "General Corporate Planning" cost pool of Account 6712, on the basis of the general allocator. PRTC must attempt to assign or attribute these costs either directly or indirectly before using the general allocator. The general allocator should be used only if costs cannot be assigned or attributed on some cost causative basis. We believe a substantial portion of these accounts can be assigned or attributed.

Account 6722 - External Relations

27. PRTC includes a "Public Relations" cost pool in this account, which it apportions on the basis of the general allocator. The *Joint Cost Order* specifically rejected this approach as applied to residual corporate advertising and required that such advertising be based on the basis of the marketing allocator.[31] PRTC is directed to amend its manual to use the marketing allocator to apportion the "Public Relations" cost pool in this account. Additionally, PRTC assigns the "Rates and regulations" and "Government Affairs" cost pools directly to regulated activities. We require PRTC to amend its manual to apportion some of the expenses in this cost pool to nonregulated activities to reflect its contact with regulatory authorities concerning nonregulated activities.

Account 6724 - Legal Expenses

28. PRTC will have four cost pools for this account, "External Legal - Regulated," "External Legal - Nonregulated," "External Legal - General," and "Corporate Legal." The costs in the former two pools will be directly assigned to regulated and nonregulated activities, respectively, while the costs in the latter two pools will be apportioned on the basis of the general allocator. We believe that the "Corporate Legal" cost pool, which should include such expenses as law library and general legal research costs, should be apportioned in the same relationship as the directly assigned legal expenses. PRTC shall amend its manual accordingly.

Account 6728 - Other General and Administrative Expenses

29. PRTC will have one cost pool for this account which it will apportion on the basis of the general allocator. We believe that for this account PRTC should have several cost pools, *e.g.*, "benefit payments," "accidents and damages," "insurance," and "general security," among others. Additionally, to the extent possible, the expenses in these cost pools should be apportioned to regulated and nonregulated activities using direct assignment, direct attribution or indirect attribution.

Account 7370 - Special Charges

30. PRTC proposes only one cost pool for this account, which it will apportion to regulated and nonregulated activities based on the general allocator. In its revisions, PRTC should include a separate cost pool in this account for charitable contributions so that we may track the amounts PRTC is claiming for contributions.

IV. PROCEDURAL ISSUES

31. In this section we address two procedural issues affecting PRTC's cost allocation manual. These issues are: (a) the submission of a revised manual in compliance with this Order, and (b) the routine submission of future amendments to the manual.

32. *Revised manual.* We have required PRTC to submit several amendments clarifying and changing many of its cost apportionment procedures. We have also directed PRTC to submit additional information concerning its affiliate transactions and time reporting mechanisms. In many cases, the additional information requested is needed to form a judgment concerning the reasonableness of PRTC's proposed methods. In the *Joint Cost Order*, the Commission specifically provided for public comment on the manuals so that a determination on their compliance with Commission requirements would be based on a full record and also that the cost allocation methodologies would be exposed to public scrutiny prior to their implementation.[32] Similarly, we believe that our review of PRTC's amendments will be aided by public comment on the revisions.

33. We will evaluate the proposed revisions, as well as the comments that we receive, before issuing an order approving or disapproving the amendments. If we disapprove a proposed revision, we shall take whatever further action is required, including mandating specific allocation methodologies or other procedures, consistent with our delegated authority to implement cost allocation manuals. In addition, to facilitate our review of the updated manual and its availability to the public, PTRC shall file two updated copies of its revised manual with the Commission in looseleaf form with numbered and dated pages, within 60 days of the release date of this Order.[33] When amendments are submitted, each revised page must clearly indicate the word "REVISED" and the date next to the page number. All amended language must be indicated by a vertical line in the right margin of the page.

34. *Routine amendments.* We also must resolve the issue of the procedures PRTC will be required to follow when updating its cost allocation manual. We conclude that PRTC will be subject to the same requirements that we imposed on the Bell Operating Companies (BOCs).[34] As we have determined in the BOC context, we recognize that the accuracy of different sections of the manual will have different effects on our ability to monitor the cost allocation process. Therefore, we will apply the following requirements for the update of PRTC's manual. First, because it is important for the Commission to obtain current information on the cost categories and how these are allocated between regulated and nonregulated activities, several categories of information require our attention before the manual is implemented. These are: (1) changes to the cost categories and their allocation mechanisms; and (2) changes in the way employee time, including nonproductive time, is allocated. Each of these changes in the cost manual must be submitted at least 60 days prior to implementation. Parties seeking to comment on the proposed amendments will be provided an opportunity to do so prior to implementation and will be

notified by public notice of the comment dates. The proposed amendments to the manual will be deemed accepted unless the Bureau, pursuant to its delegated authority, rejects or stays the effectiveness of the change.[35]

35. Second, because other information, such as corporate structure, may not be quite as critical for cost allocation monitoring purposes, we require that PTRC file such changes in a timely manner.[36] A modification to a carrier's cost manual to reflect a corporate reorganization does not require our advance approval and, therefore, does not need to be filed prior to the corporate restructuring. Finally, all other changes to the manual should be submitted quarterly, on March 31, June 30, September 30 and December 31 of each year.

36. We believe that these procedures will ensure that the ongoing process of implementing cost allocations will continue to be conducted according to the requirements in the *Joint Cost Order*. At the same time, they minimize the number of times PRTC must seek prior Commission approval before implementing a change and provides a system to ensure timely review of PRTC's proposals.

V. ORDERING CLAUSES

37. ACCORDINGLY, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. Section 154(i), that the Cost Allocation Manual filed by PRTC IS APPROVED, subject to the conditions noted in this Order.

38. IT IS FURTHER ORDERED that revised copies of the Cost Allocation Manual shall be submitted within 60 days from the release date of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, *Report and Order*, CC Docket 86-111, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), *recon.*, 2 FCC Rcd 6283 (1987) (*Reconsideration Order*), *further recon.*, FCC 88-355 (released November 18, 1988), *petitions for review pending*, Southwestern Bell Tel. Corp. v. FCC, D.C. Circuit No. 87-1764 (filed Dec. 14, 1987); National Tel. Cooperative Ass'n v. FCC, D.C. Circuit No. 87-1771 (filed December 15, 1987).

[2] 47 C.F.R. Part 32.

[3] Comments were filed by International Business Machines Corporation (IBM).

[4] In those instances where PRTC cannot make revisions retroactive to January 1, 1988, it must explain in a cover letter accompanying its revised manual its reasons for not doing so. With regard to those revisions that PRTC claims that it cannot make retroactive, we reserve the right to require either retroactivity or subsequent adjustments to reflect the impact of the lack of retroactivity on 1988 operations.

[5] *Joint Cost Order*, 2 FCC Rcd at 1328. The *Joint Cost Order* uses the term "cost categories" to describe groupings of costs that are homogeneous in nature for cost allocation purposes. The accounting profession's term for "cost categories" is "cost pools." We will use the two terms interchangeably in this Order.

[6] *Id.* at 1321-22.

[7] PRTC Manual at Section IV.

[8] Not withstanding other common carrier rules and decisions, PRTC is required to obtain the appropriate Commission authorization to engage in these activities.

[9] *Id.* at Section V.

[10] *Joint Cost Order*, 2 FCC Rcd at 1328.

[11] PRTC Manual at Section V.

[12] *See Joint Cost Order*, 2 FCC Rcd at 1355, and *Reconsideration Order*, 2 FCC Rcd at 6295. Carriers must value services at the prevailing price, if the service is generally available to the public. If it is not generally available, carriers must allocate the cost of the service pursuant to the cost allocation standards of Section 64.901 of the Commission's Rules. For assets, carriers must record transactions at the prevailing price, if one exists. If not, carriers must record assets transferred from the affiliate to the carrier at the lower of net book cost or fair market value, while assets transferred from the carrier to the affiliate will be recorded at the higher of net book cost or fair market value. *Joint Cost Order*, 2 FCC Rcd at 1343, 1345, *amended by Reconsideration Order*, 2 FCC Rcd at 6308-09.

[13] *Joint Cost Order*, 2 FCC Rcd at 1328.

[14] PRTC Manual at Section VI-1.

[15] *Id.*

[16] *Id.* at Section VI-3.

[17] *Id.* at Section VI-3 - 4. PRTC states that it leases space to Telefonica Hispanoamericana and that DISCORP designs and produces PRTC's annual report.

[18] *Joint Cost Order*, 2 FCC Rcd at 1321-22.

[19] PRTC Manual at Section III-5.

[20] *Id.* at Section III-9.

[21] *Joint Cost Order*, 2 FCC Rcd at 1319.

[22] *Reconsideration Order*, 2 FCC Rcd at 6288.

[23] PRTC Manual at Section III-4.

[24] IBM Comments at 4, n. 4.

[25] PRTC Reply at 2.

[26] PRTC Manual at Section VII-1 - VII-3.

[27] *Id.* at Section VIII-1 - VIII-14.

[28] *Joint Cost Order*, 2 FCC Rcd at 1328.

[29] Automated Reporting Requirements for Certain Class A and Tier I Telephone Companies, *Report and Order*, 2 FCC Rcd 5770, 5775 (1987) (*ARMIS Order*), *recon.*, FCC 88-311 (released October 14, 1988).

[30] Carriers must include these accounts in future releases of the ARMIS reporting requirements.

[31] *Joint Cost Order*, 2 FCC Rcd at 1323-24.

[32] We require PRTC to serve copies of its revised manual on all parties to this proceeding.

[33] One copy will be made available in the Accounting and Audits Division reference room, while the other will be maintained for staff use.

[34] *See, e.g.*, Pacific Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 287 (1988).

[35] A stay of the effectiveness of a proposed change will not extend beyond 180 days.

[36] Of course, changes to corporate structure that also affect cost categories need to be filed in advance of implementation, as discussed *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
the Application of

LAWRENCE DANIELS File No. 3751-CM-P-83

For Authority to Construct and Operate
a Multichannel Multipoint
Distribution Service Station on the
E-group channels at Detroit, Michigan

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1988; Released: December 29, 1988

By the Chief, Domestic Facilities Division:

1. This proceeding concerns a Petition to Deny filed against the above-referenced Multichannel Multipoint Distribution Service (MMDS) application of Lawrence Daniels (hereinafter referred to as Daniels). The Commission selected Daniels' MMDS application for qualification review as the result of a lottery. Virginia Communications, Inc. (hereinafter referred to as VCI) filed a post-lottery Petition to Deny Daniels' application, alleging that Daniels, together with Microband Corporation of American (hereinafter referred to as Microband), John Mester d/b/a/ Mester's TV (hereinafter referred to as Mester) and Macro/STS Venture (hereinafter referred to as Macro), violated Sections 21.13(a) and 21.901(d)(2) of Commission Rules, 47 C.F.R. §§ 21.13 (a) and 21.901(d)(2). *See Virginia Communications, Inc.*, 2 FCC Rcd 1895 (1987). Daniels and Microband filed Replies to this Petition to Deny.

2. *Pleadings*. VCI filed its Petition to Deny on February 5, 1986. It requested acceptance of its late-filed pleading, however, stating:

> The direct evidence of Microband's motives for preparation of the Daniels application (*i.e.*, the Franco affidavit discussed below) was not apparent or available until weeks after the deadline for the filing of petitions against Daniels' selection.

3. In his Reply, Daniels argued:

> The Commission's Rules provide for an orderly procedure for the processing and consideration of petitions to deny and allow a fair cut off period for the filing of such petitions. As a result, VCI's dilatory conduct and failure to comply with the Commission's procedural rules should not be condoned and its petition should be dismissed. *See, Midland Broadcasters, Inc.*, 30 RR 2d 962 (1974); *John F. Runner*, 36 RR 2d 773 (1976); *Carnegie Broadcasting Co.*, 8 RR 2d 1244 (1967).

Daniels also argued that alleged similarities between Daniels' Detroit application and Microband's Detroit application was information that was clearly available to and discoverable by VCI within the 30 day period after the release of the Public Notice announcing Daniels as the tentative selectee. Microband's role in the preparation of the Daniels application was fully disclosed in the application and the application was on file for public inspection at the Commission . . . .Consequently, the petition must be dismissed for lack of good cause which would excuse its tardy filing. *Mt. Mansfield Television, Inc.*, 27 RR 2d 1585 (1973).

4. *Discussion*. We agree with Daniels' assertions. Sections 1.824 and 21.30 of the Commission's Rules, 47 C.F.R. §§ 1.824 and 21.30, require that a petition to deny an MMDS application selected for qualification review by lottery must be filed within thirty days of the release of the public notice announcing the selection of the particular application. *See Second Report and Order, Amendment of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service*, 50 Fed. Reg. 5983, 5988 (Feb. 13, 1985).

5. In *Midland Broadcasters, Inc.*, 30 Rad. Reg. 2d 962 (1974), the Commission specifically stated:

> The Communications Act clearly provides for public participation in our processes. . . . the Communications Act just as clearly provides that it is proper to specify an orderly procedure for such participation. . . . Our present rules provide for just such an orderly procedure - a fair cut-off date for the filing of petitions to deny. . . . Absent a good cause showing as to why this cut-off date cannnot be adhered to, our rules will be strictly implemented. Otherwise, our rules of orderly procedure become stultified - they mean nothing.

Id. at 964. *See also John F.Runner*, 36 Rad. Reg. 2d 773 (1976); *Mt. Mansfield Television, Inc.*, 27 Rad. Reg. 2d 1585 (1973); *Carnegie Broadcasting Co.*, 8 Rad. Reg. 2d 1244 (1966).

6. *Conclusion*. VCI failed to justify adequately the untimely filing of its petition to deny. Accordingly, It IS ORDERED that the Petition to Deny the above-referenced MMDS application of Lawrence Daniels filed by Virginia Communications, Inc. IS DISMISSED for failure to comply with the requirements of Sections 1.824 and 21.30.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

BELLSOUTH CORPORATION PETITION FOR DECLARATORY RULING, OR ALTERNATIVE REQUEST FOR LIMITED WAIVER

Released: December 29, 1988

On December 9, 1988, BellSouth Corporation filed, pursuant to Section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, a petition for declaratory ruling, or in the alternative, a request for limited waiver to allow line build out (LBO) functionality to be provided in the transmission path of 1.544 Mbps (DS1) services as a component of regulated network interface connectors, or jacks, located on customer premises. Comments may be filed within thirty days of the date of this public notice; reply comments may be filed within fifteen days thereafter. Copies of the petition, and comments when filed, may be inspected and copied at the Commission's Public Reference Room, Rm. 6220, 2025 M St. N.W., Washington, D.C. during the hours of 8:30 a.m. - 12:30 p.m. and 1:30 p.m. - 3:00 p.m. Mondays through Thursdays. Such copies also may be purchased from the Commission's duplicating contractor, International Transcription Services, 2100 M St. N.W. Suite 140, Washington, D.C. 20037, telephone (202) 857-3800.

For further information, telephone Olga Madruga-Forti at (202) 634-1855.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re Application of

MOBILECOMM OF ALABAMA, INC. File No. 27056-CD-TC-88

Consent to Transfer of Control of PLMS stations KIF650, KRS687, KRS664, and KTS206 from Mobile Communications Corporation of America to BellSouth Corporation

RADIO & ELECTRONICS SERVICE CO. File No. 27114-CD-TC-88

Consent to Transfer of Control of PLMS stations KLF639, KIY593, KLF640, KWB455, and KLF649 from Mobile Communications Corporation of America to BellSouth Corporation

ERRATUM

Released: December 29, 1988

The Memorandum Opinion and Order, DA 88-1892, released December 15, 1988, in the above-captioned matter is corrected to read as follows: Paragraph 11. IT IS FURTHER ORDERED that the applications associated with the facilities listed in the Appendix ARE GRANTED.

In the Appendix, under Mobilecomm of New York, Inc., the facility listed as WXC456 in Pittsburgh, PA is corrected to read: WXS456 Pittsburgh, PA; and, under Mobilecomm of Florida, Inc., the facility listed as WRW259 in Jacksonville, FL is deleted.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CROCKETT TELEPHONE COMPANY, INC., WEST TENNESSEE TELEPHONE COMPANY, INC., PEOPLES TELEPHONE COMPANY, INC.

Petition for Waiver of Section 69.3(e)(6) of the Commission's Rules and Regulations

ORWELL TELEPHONE COMPANY

Petition for Waiver of Section 69.3(e)(6) of the Commission's Rules and Regulations

MEMORANDUM OPINION AND ORDER

Adopted: December 16, 1988; Released: December 21, 1988

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. Crockett Telephone Company, Inc., (Crockett), West Tennessee Telephone Company, Inc., (West Tennessee), and Peoples Telephone Company, Inc., (Peoples), have filed the captioned petition for waiver of Section 69.3(e)(6) of the Commission's Rules, 47 C.F.R. § 69.3(e)(6), which requires companies that intend to file individual access tariffs to so notify the National Exchange Carrier Association (NECA) by June 30 of the year preceding the year for which the tariff is to be effective. Crockett, West Tennessee, and Peoples request that their tardy elections to file separate traffic sensitive (TS) access tariffs now be permitted to be effective. Crockett, West Tennessee, and Peoples Petition for Waiver at 1.

2. Orwell Telephone Company (Orwell) has also filed a petition for waiver of Section 69.3(e)(6). In contrast to Crockett, West Tennessee, and Peoples, however, Orwell seeks to reverse its election to file its own TS tariff. Orwell Petition at 1-2. For the reasons stated below, we deny the Crockett, West Tennessee, and Peoples petition and grant Orwell's petition.

II. PETITIONS

A. *Crockett, West Tennessee, and Peoples Petition*

3. Crockett, West Tennessee, and Peoples state that we should grant their petition to make clear that these companies may file individual interstate access service tariffs on 90 days' notice. Petitioners explain that they interpreted Section 69.605(c)(2) of the Commission's Rules, 47 C.F.R. § 69.605(c)(2), to mean that they would lose their status as average schedule companies and be forced to settle on the basis of actual costs if they elected to file individual tariffs. Crockett, West Tennessee, and Peoples Petition at 2.[1] Petitioners' counsel subsequently informed them that Section 61.39(b)(2)(i), 47 C.F.R. § 61.39(b)(2)(i), allows them to file individual access tariffs based on their most recent annual settlements from the NECA pool.[2] Due to their confusion concerning the import of the Commission's Rules, petitioners state, they did not elect to leave the pool. *Id.* at 2-3.

4. Crockett, West Tennessee, and Peoples therefore request that we clarify that waiver of Section 69.3(e)(6) is not necessary because the Communications Act grants carriers the right to file tariffs to be effective on 90 days' notice and the Commission is not authorized to circumvent this statutory scheme.[3] Alternatively, petitioners argue, if a waiver is necessary, the public interest would be served by granting their petition and no party would be adversely affected thereby. Crockett, West Tennessee, and Peoples assert that grant of their petition would reduce their regulatory burden, improve the efficiency of their pricing and, consequently, increase consumer welfare. *Id.* at 4-5.

5. We deny the Crockett, West Tennessee, and Peoples petition because we find that petitioners have presented no good reason for waiving the deadline for the election permitted by Section 69.3(e)(6) of the Commission's Rules. As an initial matter, we reject petitioners' novel collateral attack on the validity of Section 69.3(e)(6). Although it is true the statutory scheme established by the Communications Act allows carriers to initiate tariff filings, we believe that it is beyond serious dispute that the Commission may adopt reasonable rules concerning the form and timing of elections to concur in NECA's tariff. This is particularly true in cases in which the Commission adopts rules in the exercise of the broad discretion committed to it by Section 4(i) of the Act, 47 U.S.C. § 154(i), as it did in adopting the Access Charge Rules.

6. Crockett, West Tennessee, and Peoples may withdraw from the pool by filing a timely election form with NECA by June 30, 1989, and may then file tariffs pursuant to Section 61.39(b)(2)(i) of the Rules. Petitioners have not demonstrated that remaining in the pool until that time will work any particular hardship on them. In particular, it is not clear how filing individual tariffs will reduce petitioners' regulatory burden in comparison with remaining in the NECA pool and allowing NECA to file the tariff. Nor is it clear how this would improve the efficiency of petitioners' pricing, as they baldly assert, in view of the fact that their individual rates would not be based on actual costs, but on their most recent average schedule settlements.[4] We conclude that these arguments do not present a persuasive basis for granting waiver of Section 69.3(e)(6) and find that in this case, the public interest would be better served by preserving the orderly administrative scheme that the filing deadline is intended to promote.[5]

B. *Orwell Petition*

7. Orwell states that on June 21, 1988, it filed an election form with NECA indicating its intention to file its own tariff pursuant to Section 61.39 of the Commission's Rules. Orwell now is faced with unanticipated personnel shortages, including the loss of its cost consultant, and concludes that because of these and other circumstances, Orwell cannot file its own tariff as it had in-

tended. Finally, Orwell states that it has contacted NECA and that NECA has indicated that grant of Orwell's petition would have a *de minimis* impact on NECA's TS rates. Orwell therefore requests that we waive Section 69.3(e)(6) of the Rules to permit it to continue to concur in NECA's TS tariff despite its election to file its own tariff. Orwell Petition at 1-2.

8. We conclude that Orwell's petition demonstrates the type of hardship that warrants waiver of Section 69.3(e)(6). Based on Orwell's small size and the apparent lack of qualified personnel to perform the tasks that would be necessary for it to file its own access tariff, we conclude that the public interest would be served by permitting Orwell to revoke its election to file its own tariff and to concur in NECA's tariff instead.

III. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that the petition for waiver filed by Crockett Telephone Company, Inc., West Tennessee Telephone Company, Inc., and Peoples Telephone Company, Inc., IS DENIED.

10. IT IS FURTHER ORDERED that the petition for waiver filed by Orwell Telephone Company IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* note 5, *infra*. Section 69.605(c)(2) states that "[a]ny company that does not join in association tariffs for all access elements shall not be deemed to be an average schedule company." Petitioners quote this section as including a statement that "[h]owever, such an election does not waive the requirement that each average schedule company receiving compensation under the average schedule join in all Association tariffs." It is not clear where petitioners find this language.

[2] Section 61.39 establishes cost support requirements for local exchange carriers (LECs) that serve fewer than 50,000 access lines and wish to file individual TS access tariffs. Section 61.39(b)(2) reads as follows:

> For a tariff change, the local exchange company which is an average schedule carrier must compute rates based on the following:
>
> (i) For the first period the local exchange carrier's most recent annual settlement from the National Exchange Carrier Association pool.
>
> (ii) For subsequent filings, an amount calculated to reflect the average schedule pool settlement the carrier would have received if the carrier had continued to participate, based upon the most recent average schedule formulas developed by the National Exchange Carrier Association.

[3] Crockett, West Tennessee, and Peoples Petition at 3. Petitioners cite Section 203(b) of the Act, 47 U.S.C. § 203(b), in support of this argument.

[4] We also note that it appears that the Crockett, West Tennessee, and Peoples petition is merely the product of a failure to obtain timely advice from counsel. This is not sufficient reason to waive the Commission's Rules.

[5] It is worth noting in passing that petitioners appear to believe that they would continue to be "average schedule companies" if they filed individual access tariffs pursuant to Section 61.39 of the Commission's Rules. This view is erroneous. Section 69.602 of the Rules establishes eligibility criteria for average schedule status. Although the wording of Section 61.39(b) might appear to suggest that companies filing tariffs under this section remain average schedule companies, this is neither the intent nor effect of that rule. Section 61.39 merely establishes cost support requirements for small commpanies that elect to file their own access tariffs. Section 61.39(b)(2)(i) allows carriers to use their most recent average schedule settlements as the basis for their individual rates; *i.e.*, such carriers compute their costs with reference to amounts received under the average schedules, rather than by performing actual cost studies. They do not remain eligible for average schedule settlements. It is clear, moreover, that this rule, which deals solely with tariff filing requirements, does not alter the effect of Section 69.602, which establishes average schedule eligibility criteria.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 87-551

In the Matter of

Amendment of Part 1 of the
Commission's Rules Concerning
Radiofrequency Radiation Compliance
of FM Booster Stations

REPORT AND ORDER

Adopted: December 9, 1988; Released: December 29, 1988

By the Commission:

BACKGROUND

1. On December 1, 1987, the Commission adopted a *Notice of Proposed Rule Making* (*NPRM*) regarding the potential environmental impact from radiofrequency (RF) radiation emitted from FM booster stations.[1] FM booster stations are a special class of FM translators that retransmit signals of a full service FM broadcast station to areas normally unable to receive satisfactory service from that station due to terrain obstructions. An FM booster station transmits on the frequency of its full service station and may provide service only to areas within the predicted service contour of the primary station.[2]

2. Until 1987, FM booster stations were limited to output powers of 10 watts or less. However, the Commission adopted a *Report and Order* amending Part 74 of the FCC's Rules and Regulations to permit substantial increases in the output power of these stations.[3] The new regulations limit the operation of FM booster stations only to the extent that they may not extend service beyond their primary station's 1 mV/m predicted contour nor increase interference to co-channel or adjacent channel stations. The Commission also amended its television translator rules to establish a new television booster service. Under the new rules, licensees of full service television stations may be authorized to operate TV booster stations within their predicted Grade B service area in a manner similar to that allowed for FM boosters. The new rules adopted by the Commission went into effect on September 21, 1987.

3. Under the terms of the National Environmental Policy Act of 1969, the FCC is required to determine whether the transmitters it licenses or authorizes significantly affect the "quality of the human environment."[4] Since the emission of potentially hazardous radiofrequency (RF) radiation is one of several possible environmental effects, the Commission has established rules for evaluating human exposure to RF radiation from FCC-regulated transmitters.[5] This rule is found in Section 1.1307(b) of the FCC's Rules and Regulations.[6]

4. FM boosters licensed under Part 74, Subpart L, of the Commission's Rules were previously categorically excluded from evaluation under Section 1.1307(b).[7] This exclusion was based on the low power limitations (1 or 10 watts depending on the zone in which the booster is located) previously placed on this class of transmitter. However, after those power limitations were relaxed we proposed to amend our Rules to revoke the categorical exclusion previously given to Subpart L. In the *NPRM*, we indicated that although, in general, it is unlikely that such stations would cause excessive environmental exposures to radiofrequency radiation, it no longer appeared justifiable to categorically exclude them. Therefore, we proposed to add Subpart L of Part 74 to the list of rule parts to which Section 1.1307(b) applies.

COMMENTS

5. The only comments filed in response to our NPRM were those filed by the National Association of Broadcasters (NAB). NAB supports our proposal to apply the RF radiation rule to FM booster stations. However, it points out that, as proposed, the rule change would apply to *all* transmitters licensed under Subpart L of Part 74. This would mean that low-powered FM translator stations would also be covered, although their power levels continue to be limited to 1 or 10 watts. NAB asks that the Commission only extend coverage of the RF radiation rule to FM boosters and that FM translators continue to be categorically excluded based on their low power levels. NAB also requests that the Commission provide broadcasters with several months notice prior to the effective date of the proposed rule change.

DISCUSSION

6. This *Report and Order* modifies Section 1.1307(b) of the FCC's rules in order to provide for evaluation of environmental RF radiation from FM booster stations. Due to the Commission's relaxation of power limitations on this class of stations it is no longer justifiable to categorically exclude them from environmental processing for potential human exposure to RF radiation. However, we agree with NAB that such evaluation should not be extended to FM translator stations whose power levels continue to be limited to 10 watts. Therefore, the rule amendment will only apply to FM boosters.

7. We have considered NAB's request to postpone the effective date of this rule amendment. However, we believe that only a moderate delay is necessary to allow licensees and applicants sufficient time to come into compliance with the requirements of Section 1.1307(b). Accordingly, the effective date will be 60 days after appearance of the summary of this Report and Order in the Federal Register.

8. Guidelines for determining whether a specific station is in compliance with the RF radiation rule can be obtained by reference to Technical Bulletin No. 65 published by the Commission's Office of Engineering and Technology.[8]

FINAL REGULATORY FLEXIBILITY ACT ANALYSIS[9]

9. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final regulatory flexibility analysis is as follows:

I. Need and purpose of this action:

This action is necessary to ensure FCC compliance with the National Environmental Policy Act (NEPA), and, specifically, to minimize the potential for significant environmental impact from radiofrequency (RF) radiation from FCC-regulated facilities. This order concerns RF radiation from FM booster stations.

II. Issues raised by the public in response to the Initial Regulatory Flexibility Act Analysis:

No comments were received addressing the Initial Regulatory Flexibility Analysis.

III. Significant alternatives considered and rejected:

Because of the FCC's legal obligations under NEPA, appropriate environmental evaluation must be undertaken with regard to significant sources of RF radiation under FCC jurisdiction. Therefore, the alternative of not taking any action with respect to environmental evaluation of FM booster stations has been rejected. The present course of action is considered to be a practical and reasonable way to minimize both environmental impact and administrative burden with respect to these facilities.

ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that, effective **March 6, 1989** Part 1 of the Commission's Rules and Regulations, Chapter I of Title 47 of the Code of Federal Regulations, IS AMENDED as set forth in the Appendix below and that this amendment will be applicable to applications filed on or after this effective date.

11. This action is taken pursuant to the provisions of Sections 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 154(j) and 303(r), and Section 553 of the Administrative Procedure Act, 5 U.S.C. Section 553.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 1, Chapter I, of Title 47 of the Code of Federal Regulations is amended as follows:

Part 1 - Practice and Procedure

1. The authority citation for Part 1 continues to read:

Authority: Secs. 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), and 303(r).

2. Section 1.1307, paragraph (b), is amended by revising the note as follows:

§1.1307 Actions which may have a significant environmental effect, for which environmental assessments (EAs) must be prepared.

* * * * *

(b) * * *

NOTE: Paragraph (b) shall apply to facilities and operations licensed or authorized under Parts 5, 25, 73, 74 [Subparts A, G, and L (FM boosters only)], and 80 (ship earth stations only). Facilities and operations licensed or authorized under all other Parts, Subparts, or Sections of the Commission's Rules shall be categorically excluded from consideration under paragraph (b), unless such exclusion is superseded by actions taken by the Commission under the provisions of paragraphs (c) or (d) of this Section.

* * * * *

FOOTNOTES

[1] *See Notice of Proposed Rule Making*, Gen. Docket 87-551, 52 FR 49032 (1987), 2 FCC Rcd 7231 (1987).

[2] The rules for FM booster stations are set forth in Section 74, Subpart L, of the FCC's Rules and Regulations. *See* 47 CFR §§74.1201-1284.

[3] *See Report and Order* in Docket No. 87-13, 52 FR 31398 (1987), 2 FCC Rcd 4625 (1987).

[4] *See* 42 U.S.C. §§4321 *et seq. (1976).*

[5] *See Report and Order*, Gen. Docket 79-144, 50 FR 11151 (1985), 100 FCC 2d 543 (1985); *Second Report and Order*, Gen. Docket 79-144, 52 FR 13240 (1987), 2 FCC Rcd 2064 (1987); and *Third Report and Order*, Gen. Docket 79-144, 53 FR 28223 (1988).

[6] 47 CFR §1.1307(b).

[7] *See Second Report and Order* (note 5 above).

[8] OST Technical Bulletin No. 65 entitled "Evaluating Compliance with FCC-Specified Guidelines for Human Exposure to Radiofrequency Radiation," published in 1985 by the FCC's Office of Science and Technology (now Office of Engineering and Technology). Available from the National Technical Information Service (NTIS), (800) 336-4700. Order number is: PB 86-127081. Copies may also be purchased from the Commission's

contractor for public records duplication, International Transcription Services, Inc., 2100 M Street, N.W., Washington, D.C., (202) 857-3800.

[9] This analysis is made pursuant to the provisions of the Regulatory Flexibility Act of 1980, 5 U.S.C. §604.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-47

In the Matter of

Amending Sections 21.108(c) and 94.75(b) of the Commission's Rules (a) to provide for a minimum Antenna Gain of 34.0 dBi for the 10550 MHz-10565 MHz and 10615 MHz-10630 MHz segments of the 10550 MHz 10680 MHz Band and (b) to provide for new sidelobe suppression standards for antennas with minimum gain of 34.0 dBi. RM-5192

REPORT AND ORDER

Adopted: November 29, 1988; Released: December 30, 1988

By the Commission:

1. By a Notice of Proposed Rule Making (*Notice*) in the above-captioned docket, we proposed to revise the tables of Antenna Standards specified in Sections 21.108(c) and 94.75(b) of the Commission's Rules, 47 C.F.R. §§ 21.108(c) and 94.75(b), to provide for a minimum antenna gain of 34 dBi, instead of the present 38 dBi standard, for the 10550 MHz-10565 MHz and 10615 MHz-106 30 MHz segments of the 10550 MHz-10680 MHz band.[1] This action was taken in response to a Petition for Rule Making (Petition) filed by the Harris Corporation, Farinon Division (Harris). Harris maintained that the reduction in antenna gain standard would enable point-to-point microwave licensees of these segments of the 10550 MHz-10680 MHz band to use smaller, less expensive antennas that will require less space on congested metropolitan roof tops. Harris argued the requirement of a 38 dBi minimum gain antenna for point-to-point microwave service in these segments of the 10550 MHz-10680 MHz band unnecessarily burdens the public with higher costs, and has restricted development of the frequency band.

2. In the *Notice*, we tentatively found that the proposed reduction in antenna gain standard would be in the public interest because permitting smaller, lower cost antennas would increase options for consumers. We further tentatively concluded that adoption of a relaxed sidelobe suppression standard would not adversely impact co-channel and adjacent channel users in these segments of the 10 GHz band.[2] Nonetheless, we sought comment on whether relaxing the sidelobe suppression standard, as proposed by the Harris Petition, may result in new or increased interference to co-channel and adjacent channel licensees operating in these segments of the 10550 MHz-10680 MHz band. We were concerned that any significant increase in interference would have the effect of reducing channel capacity on those channels employing digital modulation techniques and of lowering acceptable threshold carrier/noise levels on those channels employing analog systems.

3. Accordingly, we requested comments as to the potential for the proposed change in sidelobe suppression levels to increase significantly the interference noise levels on co-channels and adjacent channels in these segments of the 10 GHz band. We also requested comments on whether the relaxation in sidelobe suppression levels would potentially contribute to new or increased interference to point-to-point microwave licensees. Finally, we requested that commenters propose alternative suppression levels should the proposed levels have the potential to generate or contribute significant new or increased interference to co-channels and to adjacent channels. Only Harris filed responsive comments.

II. COMMENTS AND DISCUSSION

4. Harris agrees with the Commission's tentative conclusion that relaxation of the sidelobe suppression standard will not adversely impact users of co-channel and adjacent channel assignments in these segments of the 10 GHz band. In fact, it argues that use of the 34 dBi gain standard, in lieu of a minimum gain of 38 dBi, could actually reduce the interference levels in the same service by as much as 4 to 6 dB. Harris further contends that antennas with diameters of 3.25 feet, as required by the 38 dBi standard, are not commercially available, whereas, antennas with diameters of 2 feet, as required by the 34 dBi standard, are commercially available. Harris states that its experience with 2-foot antennas demonstrates that they can be employed for point-to-point microwave service without significant interference problems. Harris observes that point-to-point microwave systems employing 34 dBi gain antennas are currently licensed by the Commission, and have not exhibited any notable interference problems. In support of this statement, Harris provides co-channel and adjacent channel carrier-to-interference (C/I) ratios to demonstrate bit error rate (BER) performance under various conditions of threshold-to-interference versus frequency spacing. These studies, in addition to other studies of antenna gain characteristics initiated by Harris, lead it to recommend a slight modification of the sidelobe suppression standard proposed in the *Notice*. Specifically, Harris suggests revising standards for Category A antennas in the 20' to 30', 100' to 140', and 140' to 180' columns. These revisions are proposed to conform to Milliflect Model JM 1024 FA antenna, which Harris concluded to be the optimum antenna gain and pattern for the 34 dBi standard. Harris states these changes will facilitate economical and increased use of the radio spectrum.

5. We concur with Harris that the public interest will be served by adopting the revised Antenna Standards for the 10550 MHz-10565 MHz and 10615 MHz-10630 MHz segments of the 10550 MHz-10680 MHz band. A reduction in antenna gain from 38 dBi to 34 dBi will foster the use of smaller, lower cost antennas. In addition, relaxation of the suppression standards also should result in lower cost to users. [3] The Harris' proposal is unopposed, and its comments demonstrate increased interference should not result from the changes it recommends. The Commission generally supports changes of its rules that appear likely

to lower costs and increase options for users of the radio spectrum. The antenna gain and suppression standards will be revised as follows:

Frequency (MHz)	Category	Maximum beam width to 3 dB points (Included angle in degrees)	Minimum Antenna Gain (dBi)	5° to 10°	10° to 15°	15° to 20°	20° to 30°	30° to 100°	100° to 140°	140° to 180°
10550 to 10565	A	3.4	34.0	20	24	28	32	35	55	55
	B	3.4	34.0	20	24	28	32	35	35	39
10565 to 10615	n/a	360	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
10615 to 10630	A	3.4	34.0	20	24	28	32	35	55	55
	B	3.4	34.0	20	24	28	32	35	35	39

6. *Final Regulatory Flexibility Analysis*. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. § 605, it is certified that the proposed rule will not have a significant economic impact on a substantial number of small entities because the proposed rule is a less stringent antenna gain standard than the current regulation. The economic impact of adopting the proposed rule is that antennas employed in the point-to-point microwave radio service will cost less to produce.

7. Authority for this Rule Making is contained in Sections 1, 4(i), 303(e), (f), and (r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 303(e), 303(f), 303(r), and Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553.

8. Accordingly, IT IS ORDERED, that Sections 21.108(c) and 94.71(b) of the Commission's Rules and Regulations be amended as specified in Appendix A below, effective **February 7, 1989.**

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *See* Notice of Proposed Rule Making, CC Docket No. 87-47, RM-5192, 2 FCC Rcd 1912 (1987).

[2] This tentative conclusion was based upon experience gained from Digital Termination User Station utilization of 34 dBi gain antennas with sidelobe suppression characteristics essentially equivalent to the standard proposed in the Harris Petition, and adopted herein. The Digital Termination User station utilization did not result in any significant increase in interference on co-channels and adjacent channels.

[3] The revised antenna standards are a relaxation of the sidelobe suppression requirements in all but one case--category B antennas from 140° to 180°. The new standard in this range for category B antennas is 3 dB greater (i.e., requires 3 dB more attenuation). Entities licensed before January 1, 1989, in the 10550-10680 MHz band and employing category B antennas, need only meet the former 36 dB suppression standard for the 140° to 180° range.

APPENDIX A

Part 21 of Title 47 of the Code of Federal Regulations is amended as follows:

1. Part 21 - DOMESTIC PUBLIC FIXED RADIO SERVICES

The authority citation for Part 21 continues to read as follows:

Authority. 47 U.S.C. 154, 303.

2. Section 21.108(c) is amended by revising the table of Antenna Standards as follows:

21.108 Directional antennas.

* * * * *

(c)***

ANTENNA STANDARDS

Frequency (MHz)	Category	Maximum beamwidth to 3 dB points (Included angle in degrees)	Minimum Antenna Gain (dBi)	Minimum radiation suppression to angle in degrees from centerline of main beam in decibels 5` to 10`	10` to 15`	15` to 20`	20` to 30`	30` to 100`	100` to 140`	140` to 180`
2,500 to 5,000	A	n/a	36.0	23	29	33	36	42	55	55
	B	n/a	36.0	20	24	28	32	32	32	32
5,000 to 10,550	A	n/a	38.0	25	29	33	36	42	55	55
	B	n/a	38.0	20	24	28	32	35	36	36
10,550 to 10,565 4	A	3.4	34.0	20	24	28	32	35	55	55
	B	3.4	34.0	20	24	28	32	35	35	39
10,565 to 10,615	n/a	360	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a

10,615 to 10,630	A	3.4	34.0	20	24	28	32	35	55	55
	B	3.4	34.0	20	24	28	32	35	35	39
10,630 to 10,680	n/a	n/a	34.0	20	24	28	32	35	36	36
17,700 to 18,820	A	n/a	38.0	25	29	33	36	42	55	55
	B	n/a	38.0	20	24	28	32	35	36	36
18,920 to 19,700 1	A	n/a	38.0	25	29	33	36	42	55	55
	B	n/a	38.0	20	24	28	32	35	36	36
21,200 to 23,600	A	n/a	38.0	25	29	33	36	42	55	55
	B	n/a	38.0	20	24	28	32	35	36	36
31,000 to 31,300 2,3	n/a	4.0	38.0	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Above 31,300	A	n/a	38.0	25	29	33	36	42	55	55
	B	n/a	38.0	20	24	28	32	35	36	36

1 Digital Termination User Station antennas and point-to-point microwave radio station antennas in this band shall meet performance Standard B and have a minimum antenna gain of 34 dBi.

2 The minimum front-to-back ratio shall be 38 dBi.

3 Mobile, except aeronautical mobile, stations need not comply with these standards.

4 Except for such antennas between 140` and 180` authorized or pending on January 1, 1989 for which minimum radiation suppression to angle (in degrees) from centerline of main beam is 36 decibels.

NOTE: Stations must employ an antenna that meets the performance standards for Category A, except that in areas not subject to frequency congestion, antennas meeting standards for Category B may be employed. Note, however, that the Commission may require the use of a high performance antenna where interference problems can be resolved by the use of such antennas.

* * * * *

Part 94 of Title 47 of the Code of Federal Regulations is to be amended as follows:

1. Part 94 -- PRIVATE OPERATIONAL - FIXED MICROWAVE SERVICE

The authority citation for Part 94 continues to read as follows:

Authority. 47 U.S.C. 154, 303.

2. Section 94.75(b) is amended by revising the table of Antenna Standards as follows:

94.75 Antenna limitations.

* * * * *

(b)***

ANTENNA STANDARDS

Frequency (MHz)	Category	Maximum beamwidth to 3 dB points (Included angle in degrees)	Minimum Antenna Gain (dBi)	Minimum radiation suppression to angle in degrees from centerline of main beam in decibels						
				5° to 10°	10° to 15°	15° to 20°	20° to 30°	30° to 100°	100° to 140°	140° to 180°
952 to 960 1,4	A	14.0	n/a	....	6	11	14	17	20	24
	B	20.0	n/a	....	....	6	10	13	15	20
1,850 to 2,690 2	A	5.0	n/a	12	18	22	25	29	33	39
	B	8.0	n/a	5	18	20	20	25	28	36
6,525 to 6,875	A	1.5	n/a	26	29	32	34	38	41	49
	B	2.0	n/a	21	25	29	32	35	39	45
10,550 to 10,565 9	A	3.4	34.0	20	24	28	32	35	55	55
	B	3.4	34.0	20	24	28	32	35	35	39
10,565 to 10,615 3	n/a	360	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
10,615 to 10,630	A	3.4	34.0	20	24	28	32	35	55	55
	B	3.4	34.0	20	24	28	32	35	35	39
10,630 to 10,680 3	n/a	n/a	34.0	20	24	28	32	35	36	36
12,200 to 13,250 6	A	1.0	n/a	23	28	35	39	41	42	50
	B	2.0	n/a	20	25	28	30	32	37	47
17,700 to 19,700 3	A	n/a	38.0	25	29	33	36	42	55	55
	B	n/a	38.0	20	24	28	32	35	36	36
21,200 to 23,600 5	A	n/a	38.0	25	29	33	36	42	55	55
	B	n/a	38.0	20	24	28	32	35	36	36
31,000 to 31,300 7,8	n/a	4.0	38.0	n/a	n/a	n/a	n/a	n/a	n/a	n/a

27,500 to 29,500	A	n/a	38.0	25	29	33	36	42	55	55
	B	n/a	38.0	20	24	28	32	35	36	36
38,600 to 40,000	A	n/a	38.0	25	29	33	36	42	55	55
	B	n/a	38.0	20	24	28	32	35	36	36

1 Except for frequencies listed in § 94.65(a)(1), where omnidirectional antennas may be used.

2 Except for 2150 MHz-2160 MHz, where the maximum beamwidth is 360 degrees and except for frequencies in the 2500 MHz-2690 MHz band, where standards contained in § 94.95 apply.

3 Except as provided in § 94.199 for Digital Termination System antennas.

4 Antennas used at outlying stations as part of a central protection alarm system need conform to only the following 2 standards: (1) The minimum on-beam forward gain must be at least 10 dBi, and (2) the minimum front-to-back ratio must be at least 20 dB.

5 Except as provided in § 94.91.

6 Except for temporary-fixed operations in the band 13200 MHz-13250 MHz with output powers less than 250 mW and as provided in § 94.90.

7 The minimum front-to-back ratio shall be 38 dBi.

8 Mobile, except aeronautical mobile, stations need not comply with these standards.

9 Except for such antennas between 140° and 180° authorized or pending on January 1, 1989 for which minimum radiation suppression to angle (in degrees) from centerline of main beam is 36 decibels.

NOTE: Stations in this service must employ an antenna that meets the performance standards for Category A, except that, in areas not subject to frequency congestion antennas meeting standards for Category B may be employed. Note, however, that the Commission may require the use of a high performance antenna where interference problems can be resolved by the use of such antennas.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-547

In re Applications

BROADCAST FACILITIES CORPORATION (hereafter BFC)	File No. BPH-851204MD
FRANK E. PENNY & DEAN AUBOL (hereafter Penny)	File No. BPH-851205MF
FRANKFORT ASSOCIATES (hereafter Associates)	File No. BPH-851205MG
WTMK BROADCASTING CORPORATION (hereafter WTMK)	File No. BPH-851205MI
EDWARD F. & PAMELA J. LEVINE, JOINT TENANTS (hereafter Levines)	File No. BPH-851205MJ

For a Construction Permit
For a New FM Station
on Channel 235B in
Frankfort, New York

HEARING DESIGNATION ORDER

Adopted: November 18, 1988; Released: December 20, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *Preliminary Matters.* On April 23, 1986, WTMK filed a Petition to Dismiss against BFC. In its May 7, 1986, Opposition to Petition to Dismiss, BFC argues that WTMK's Petition was untimely and thus should not be considered. Pursuant to Section 73.3584 of the Commission's Rules, WTMK had until April 23, 1986 to file its petition; as the Petition was filed with the Commission on this date, it is considered timely, and all issues raised within will be considered. First, WTMK alleges in its Petition that BFC filed its application for the purpose of impeding, obstructing or delaying determination on any other application.[2] WTMK proffers as evidence to its allegation the fact that Robert Raide, BFC's president, initially filed comments against the assignment of Channel 235B to Frankfort. This argument, as advanced against BFC, Associates and the Levines, is essentially a petition to specify issues. Since the Commission's *Report and Order* in re *Revised Procedures for the Processing of Contested Broadcasting Applications: Amendments of Part 1 of the Commission's Rules*, 72 FCC 2d 202, (1979), directed the deletion of all issue pleadings in pending cases, the matters sought to be raised in this petition will not be considered. Accordingly, an opportunity to raise any allegations contained therein will be afforded the parties post-designation pursuant to Section 1.229.

3. Additional arguments within the petition concern the tenderability and acceptability of BFC's application. WTMK argues that BFC's application contains inconsistencies which render it untenderable. WTMK argues first that the telephone numbers on the application are the telephone numbers of BFC's attorney and not the principals of BFC. This is certainly not a tenderability defect, as it is perfectly acceptable for the contact phone numbers to be that of an applicant's attorney. The Commission requires only that the phone number given be one by which the applicant may be contacted. If the applicant can be contacted through its attorney, the Commission will not consider the attorney's telephone number to be unacceptable.

4. WTMK's second and third tenderability arguments both deal with alleged transmitter site location discrepancies. The first asserted discrepancy is that in Section V-G, Item 1, BFC gives the transmitter location as Utica, New York, while the actual location, according to WTMK, is Frankfort. Although WTMK is technically correct that the antenna location is not in Utica--the topographical map clearly shows the transmitter to be in Herkimer County while Utica is in Oneida County--the Commission does not find that this warrants dismissal of BFC's application. Following BFC's Utica antenna location statement in Section V-G, Item 1 is information stating that the antenna is located at "Wilson Rd., NE of Graffenburg Rd. *6 km SE of Utica.*" (Emphasis added) Furthermore, on BFC's antenna sketch, submitted as Figure 3, BFC describes the location as being in "Herkimer Co., *11 km NW of Frankfort.*" (Emphasis added) From these statements, it is clear that BFC is not claiming the transmitter is directly within the Utica city limits, but named Utica as the location only because it is the nearest community to the transmitter location.

5. WTMK's second site discrepancy/tenderability argument is that there is a conflict between Section V-G, Item 4 of BFC's FCC Form 301 and BFC's FAA Notice Form. BFC, in Section V-G, Item 4, lists the distance of its proposed transmitter from Frankfort Highlands Airport as 3 miles and the listed distance on the FAA Notice is 2.6 miles. Such an inconsistency would not be a tenderability defect as it is not listed as a tenderability item in Appendix D of the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (May 13, 1985). Nor would the Commission consider it an acceptability defect since all necessary engineering determinations can still be made. The 3 mile figure listed in Section V-G, Item 4, is obviously a rounded figure. As for both the site discrepancy arguments, the Commission can readily determine the exact location of BFC's proposed site from the coordinates listed in Section V-G, Item 1 and the coordinates plotted on the topographical map submitted as Figure 5. Since the Commission can confidently and reliably determine the exact location of the antenna from the four corners of the application, in accordance with the *Report and Order* in MM Docket 84-750, *supra*, WTMK's arguments to dismiss BFC carry no weight.

6. The final tenderability argument advanced by WTMK is that BFC does not depict obstruction lighting on its tower sketch. For our purposes, BFC's antenna sketch is complete. The Commission is concerned with the overall height of the antenna (including obstruction lighting). In Section V-B, Item 9, BFC lists the structure height above ground without obstruction lighting as 104.1 meters. In the chart for Section V-G, Item 5, BFC states the height above ground including obstruction lighting is 105 meters; illustrating that obstruction lighting is utilized. On the tower sketch submitted as Figure 3, BFC depicts a tower 105 meters above ground. Although no lighting is drawn onto the sketch, the Commission can confidently and reliability determine that lighting is utilized since the height depicted in the sketch parallels the height above ground including obstruction lighting listed in Section V-G, Item 5. The tower sketch does depict the overall height of the antenna, as required, thus the Commission can complete all necessary engineering studies. Accordingly, finding that WTMK's tenderability arguments lack merit, WTMK's Petition to Deny BFC's application will be herein denied.

7. On September 13, 1988, Penny filed a motion to dismiss its application upon its own motion. Penny, however, has not fully complied with the Commission's Rules for dismissal of its application. Section 73.3525 requires an applicant filing a motion to dismiss its application to file "an affidavit as to whether or not consideration (including an agreement for merger of interests) has been promised to or received by such applicant, directly or indirectly." 47 C.F.R. § 73.3525(c). Accordingly, before the Commission can grant the motion to dismiss, Penny must file with the presiding Administrative Law Judge the requisite affidavit called for in 47 C.F.R. § 73.3525(c).

8. WTMK also filed a Petition to Dismiss on April 23, 1986, against Associates. In this pleading, WTMK claims that Associates has failed to publish a local notice of its application pursuant to Section 73.3580 of the Commission's Rules, that Associates lacks a reasonable assurance of site availability and that the application was filed to obstruct or impede other applications. (*See* Footnote 2, *supra)* As for the first argument that Associates has not published a local notice, Associates explains in its May 7, 1986, Opposition to Petition to Dismiss, that Associates has commenced publishing the notice on April 30, 1986. WTMK concedes in its May 14, 1986, Reply to Opposition to Petition to Dismiss that the notice issue is moot.

9. WTMK alleges in its pleading against Associates that Mr. Stillwell, the contact person for the site certification, did not enter into an agreement for the use of his land. This argument represents another attempt by WTMK to specify issues. As explained in Paragraph 2, *supra*, the Commission has directed the deletion of such matters. Accordingly, the issues sought to be raised in this regard will not be considered. WTMK will be offered an opportunity to raise any allegation contained therein in hearing pursuant to Section 1.229 of the Commission's Rules. Finding that WTMK has shown no reason which merits the dismissal of Associates' application, WTMK's Petition to Dismiss Associates' application will be denied herein.

10. On April 23, 1986, BFC also filed a Petition to Dismiss against Associates. BFC's sole argument is that the contour map submitted by Associates as Figure 2, filed in response to Section V-B, Item 10, does not clearly outline the legal boundaries of the principal community to be served. [3] A close look at Associates' contour map shows a point marked as "Frankfort" slightly to the right of the proposed tower location directly on the 90° radial and clearly within the 3.16 m/Vm contour, thus complying with Section 73.315 of the Commission's Rules. The area marked as "Frankfort" on the map is merely a pinpoint, thus there are no boundaries which can be clearly outlined. Associates has attempted to highlight the community of license by underscoring the applicable town of Frankfort. From the materials before us, it is apparent that the point labeled "Frankfort" on Associates' exhibit is the "village of Frankfort," and not the larger "town of Frankfort," which encompasses, among other communities, the village of Frankfort. While Associates did not outline the boundaries of the town of Frankfort, we find there is a genuine issue whether the community to be served by the Frankfort allocation is the larger area referred to as the "town of Frankfort," or the smaller area referred to as the "village of Frankfort." If the allocation is to the smaller village of Frankfort, then the principal community is literally a "dot on the map." As such, the applicant's designated pinpoint is all that can be required. The Order allocating Channel 235B to Frankfort offers no assistance. The Order speaks of both the village and township of Frankfort and concludes in holding "that the public interest would be served by the allocation of . . . Channel 235 to Frankfort as [this] communit[y]'s first local FM allotment." *Report and Order* in MM Docket 84-894, released September 27, 1985. Thus, the *Report and Order* does not clearly specify whether the allotment is allocated to the village or town of Frankfort. There being a legitimate question, the Commission cannot penalize an applicant for portraying the smaller community on its contour map. The Commission, in comparable situations, has designated the issue of which community is to be served for hearing. *See George Henry Clay*, MM Docket 87-567, Released January 7, 1988. However, the Commission in this case finds it unnecessary to designate an issue; regardless of whether the correct boundary is that of the town of Frankfort or the village of Frankfort, Associates, as well as all other Frankfort applicants, clearly encompass the entire community within its 70 dBu contour. Accordingly, BFC's Petition to Deny filed against Associates will be denied herein.

11. On April 23, 1986, WTMK filed a Petition to Dismiss against the Levines. In this pleading, WTMK alleges that: (1) the Levines failed to file a separation study; (2) their proposed site is short-spaced to Canadian station CIMF-FM, Hull, Quebec and to pending applications for Channel 288A in Little Falls, New York; (3) the Levines have failed to notify the FAA; (4) their contour map is defective and; (5) their application was filed to impede or obstruct other applications. (*See* Footnote 2, *supra)* As will be described below, the Commission finds no argument adequate to justify the dismissal of the Levines' application. Thus, WTMK's Petition to Dismiss will be denied herein.

12. The Commission's own separation study has shown no short-spacing problems with regard to the Levines' application. Canadian station CIMF operates on co-Channel 235C1. Section 73.207(b) of the Commission Rules and the *Canadian - United States FM Broadcasting Agreement of 1947* require a minimum separation of 271 kilometers between a Class B and a co-Channel Class C1 station. The Levines' proposed site is 272.3 kilometers from CIMF's operating site and, thus, the Levines fully

comply with our spacing rules in regards to CIMF. As for the applications for the Channel 288A allocation in Little Falls, New York, the Levines are required to have a minimum separation of 16 kilometers from all applications for this intermodulation channel. There were four applications filed for Little Falls with file numbers BPH-850711PU, BPH-850712T1, BPH-850712T3 and BPH-850712T4. The Levines' proposed site is spaced from the Little Falls applicants' proposed sites by 15.6, 20.4, 21.0 and 21.4 kilometers respectively. With the exception of the application from which the Levines are spaced by 15.6 kilometers, the Levines are clearly fully spaced. Due to rounding, the 15.6 kilometer spacing from the BPH-850711PU application, is also acceptable. The Levines, therefore, are fully spaced to all stations and allocations warranting protection.

13. WTMK further asserts that the Levines have failed to notify the Federal Aviation Administration (FAA) of their proposed construction. The Levines have certified in Section V-G, Item 3 of their application that the Eastern Regional Office of the FAA will be so notified. While it is true that at this time the Levines' proposed site has not been cleared through the FAA, it is not a tenderability nor an acceptability defect to not have clearance. When a party lacks clearance at the time of designation, the FAA is made a party to the hearing, and an issue is added for the purpose of determining whether there is a possibility of an air hazard from the proposed facility.

14. WTMK asserts that the contour map submitted by the Levines as Exhibit E-1 does not indicate channel number, frequency, longitude nor latitude, and does not outline the community of license. Contour maps which are filed in response to Section V-B, Item 10, must show: (a) proposed transmitter location with radials; (b) the 3.16 mV/m and the 1 mV/m contours; (c) the legal boundaries of the principal community to be served; (d) the area and population figures within the 1 mV/m contour; and (e) scale of miles. Therefore, it is no defect for the Levines to exclude channel, frequency, longitude and latitude. Furthermore, the Levines' contour map does clearly indicate Frankfort and, as supported by the May 7, 1986, Opposition to Petition to Dismiss filed by the Levines, the map does outline the boundaries of the village of Frankfort, which pursuant to the discussion in paragraph 10, *supra*, is acceptable. We do not agree with WTMK's May 14, 1986 Reply to Opposition to Petition to Dismiss that it was obvious in the *Report and Order* in MM Docket 84-894, *supra*, that the town of Frankfort is the correct community specified by the Commission. *See* discussion in Paragraph 10, *supra*.

15. BFC filed a Petition to Dismiss against the Levines on April 11, 1986 claiming that the Levines incorrectly answered Section V-B, Item 9 on their FCC Form 301. Section V-B, Item 9 asks for the "[o]verall height of complete structure above ground (*without obstruction lighting*). " (Emphasis in original) The Levines answered 271 feet. BFC claims this must be incorrect since the tower sketch submitted as Exhibit E-4 indicates that the tower will have an overall height of 271 feet including obstruction lighting. The Levines explain this apparent inconsistency in their April 23, 1986 Opposition to Petition to Dismiss. The proposed tower, the Levines explain, will contain lightning rods which extend beyond the height of the lighting beacon. Therefore, the height without obstruction lighting will be the same as the height including the obstruction lighting. BFC counters with various arguments in its May 1, 1986 Reply to Opposition to Petition to Dismiss. BFC contends that neither the height of the obstruction lighting nor the lightning rods are depicted on the sketch. BFC has overstated the Commission's antenna sketch requirements. For our purposes, the Levines' tower sketch details all relevant data. It is irrelevant, for our studies, whether the obstruction lighting is one foot or ten feet below the overall height. For this reason, on the new FCC Form 301 (October 1986 version) applicants are no longer even required to list heights without obstruction lighting, but instead are required to list only the overall height. The Commission has been able to complete its engineering review of the Levines' application from the material supplied. Finding BFC's assertion unconvincing, we will deny its Petition to Dismiss herein.

16. *BFC*. Section II, Item 4(a), FCC Form 301 (April 1985) requires an applicant to specify its address (number, street, city, state) as well as the home address of each of its principals. BFC's application gives a Post Office Box number as the address for principals Robert J. Stillwell and Arlene C. Stillwell. Accordingly, BFC must submit an amendment which gives all the information required by Section II, Item 4(a), FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

17. *WTMK*. Where applicants for a new broadcast station propose to employ five or more full-time employees, 47 C.F.R. § 73.2080 requires those applicants to submit Equal Employment Opportunity (EEO) Programs with their applications. Section VI of FCC Form 301 specifies the use of a five-point format set out in FCC Form 396A. In its application, WTMK stated it will employ five or more full-time employees. However, while WTMK did submit an EEO program, WTMK has failed to include within Part IV adequate examples of minority and women's organizations. WTMK merely listed colleges and universities which do not suffice as minority or women's organizations. Accordingly, WTMK will be required to file an amended EEO program with the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

18. WTMK is proposing to construct a new tower with effective radiated power (ERP) of 50 kW (H&V) and center of radiation above ground height of 50 meters. An engineering study based upon OST Bulletin No. 65, October 1985 entitled "Evaluating Compliance with FCC-Specified Guidelines for Human Exposure to Radiofrequency Radiation" reveals that the ANSI limit of one milliwatt per square centimeter may be significantly exceeded in the area immediately surrounding the tower base. Accordingly, WTMK is required to amend its application within 30 days of the release of this Order to demonstrate compliance with the RF radiation guidelines. The cumulative effect of the proposed operation must be considered. Since the proposal of WTMK may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, WTMK is required to submit the environmental impact information described in 47 C.F.R. § 1.1311. Accordingly, WTMK will be required to file within 30 days of the release of this Order an environmental assessment with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308.

Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting*, 71 FCC 2d 229 (1979). *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

19. *Air Hazard.* Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and Associates and the Levines have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Associates and the Levines would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

20. *Other Matters.* The applicants below have petitioned for leave to amend their applications. Each of the accompanying amendments were filed after the last day for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, any applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
BFC	March 20, 1986
	May 16, 1988 (engineering)
Levines	March 7, 1986
	October 28, 1986

21. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the area and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

22. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

23. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to WTMK, in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by Associates and the Levines would constitute a hazard to navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

24. IT IS FURTHER ORDERED, That the April 23, 1986 Petition to Dismiss filed by WTMK against BFC IS HEREBY DENIED.

25. IT IS FURTHER ORDERED, That Penny file an affidavit demonstrating compliance with 47 C.F.R. § 73.3525(c) with the presiding Administrative Law Judge within 30 days of the release of this Order.

26. IT IS FURTHER ORDERED, That the April 23, 1986 Petition to Dismiss filed by WTMK against Associates IS HEREBY DENIED to the extent indicated herein.

27. IT IS FURTHER ORDERED, That the April 23, 1986 Petition to Dismiss filed by BFC against Associates IS HEREBY DENIED.

28. IT IS FURTHER ORDERED, That the April 23, 1986 Petition to Dismiss filed by WTMK against the Levines IS HEREBY DENIED.

29. IT IS FURTHER ORDERED, That the April 11, 1986 Petition to Dismiss filed by BFC against the Levines IS HEREBY DENIED.

30. IT IS FURTHER ORDERED, That BFC shall submit an amendment which contains the information required by Section II, Item 4(a), FCC Form 301, to the presiding Administrative Law Judge within 30 days after this Order is released.

31. IT IS FURTHER ORDERED, That WTMK shall file an amended EEO program with the presiding Administrative Law Judge within 30 days after the release of this Order.

32. IT IS FURTHER ORDERED, That WTMK shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order.

33. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

34. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by BFC and the Levines ARE HEREBY GRANTED, and the accompanying amendments ARE HEREBY ACCEPTED to the extent indicated herein.

35. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

36. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

37. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section

73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] An application filed by Sonshine Media of Utica (File No. BPH-851129MB) (Sonshine) was returned by the Chief of the FM Branch on February 26, 1986. Sonshine filed a Petition for Reconsideration on March 26, 1986. By letter dated June 22, 1988, the Commission granted Sonshine's Petition. The June 22, 1988 letter, however, dismissed Sonshine's application for proposing a facility which is short-spaced to Canadian station CIMF, Hull, Quebec, in violation of 47 C.F.R. § 73.207 and the *Canadian - United States FM Broadcasting Agreement of 1947*. Additionally, an application filed by Family Stations, Inc. (File No. BPH-851205MH) was dismissed on June 22, 1988 for proposing a site which was also short-spaced to station CIMF.

[2] WTMK also advances this identical argument of an application being filed for the purpose of impedance in its petitions against Associates and the Levines. For the purpose of administrative convenience, all such arguments will herein be consolidated.

[3] WTMK, in its May 14, 1986, Reply to Opposition to Petition to Dismiss, also alleged this same defect in Associates' application. This argument, as for WTMK, must be dismissed as procedurally defective pursuant to 47 C.F.R. § 1.45(b) as new matters may not be raised in replies.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Commission Requirements for
Cost Support Material
To Be Filed by Tier 2
Companies with 1989 Annual
Access Tariffs

ERRATUM

Adopted: December 13, 1988; Released: December 14, 1988

By the Deputy Chief, Common Carrier Bureau:

1. In Attachment A of the Order in the above-entitled matter, released December 2, 1988, errors were made on the charts and in the appendices to the charts. The attached pages reflect the corrected charts and appendices. The pages are numbered as they were in Attachment A of that Order.

2. The specific changes appear on the attached pages. The changes are as follows:

(1) Delete "(Dollars in Thousands)" from the titles of chart T2ACOS-1(P), pages 1 through 6 chart T2ACOS-1(P) Addendum, pages 1 through 3, chart T2ACOS1(H), pages 1 through 6, and chart T2ACOS-2, pages 1 through 3.

(2) Enter "N/A" in revenue, tax, and return rows in the columns for Billing & Collection and Interexchange in chart T2ACOS-1(P), and in the Interstate column in charts T2ACOS-1(P) and T2ACOS-1(P) Addendum as depicted on the attached pages.

(3) Enter "N/A" in several revenue requirement rows in the Other Interstate and Total Interstate columns in T2ACOS-2 and T2BCOS-2 as depicted on the attached pages.

(4) Delete the last sentence in the description of Column B on page 28 in the T2COS-APP that begins "If the amount shown . . . ".

(5) In the description of row 540 on pages 4, 6, and 8 in the T2DEP-APP, the text should read "(520-530)" rather than "(520+530)".

(6) Change the row numbers on chart T2DMD-2, page 1, under the heading "Circuit and Mileage" to be 150, 160, 170, 180, and 190, rather than 100, 110, 120, 130, and 140.

(7) Insert aditional columns in T2RTE-2, page 1, to reflect rates to become effective January 1, 1989.

FILING ENTITY:

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COST ANALYSIS SUMMARY

Classifications	Calendar Year 1989 Total	Annualized 4/1/88 to 12/31/88 Test Period Total	Non-Reg	Other Adjust.	Subject To Separations	State	Interstate
	(A)	(B)	(C)	(D)	(E)=B-C-D	(F)	(G)
Revenues							
100 Network Access	N/A	N/A	N/A	N/A	N/A	N/A	N/A
110 Local Network	N/A	N/A	N/A	N/A	N/A	N/A	N/A
120 Toll Network	N/A	N/A	N/A	N/A	N/A	N/A	N/A
130 Miscellaneous	N/A	N/A	N/A	N/A	N/A	N/A	N/A
140 AFUDC	N/A	N/A	N/A	N/A	N/A	N/A	
150 Uncollectibles	N/A	N/A	N/A	N/A	N/A	N/A	N/A
170 Common Line Support	N/A	N/A	N/A	N/A	N/A	N/A	N/A
171 Long Term	N/A	N/A	N/A	N/A	N/A	N/A	N/A
172 Transitional	N/A	N/A	N/A	N/A	N/A	N/A	N/A
175 Net Revenues	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Expenses							
180 Plant Specific							
190 Plant Non-specific Less Depr.							
200 Marketing							
210 Customer Operations Services							
220 Access							
230 Corporate Operations							
240 Extraordinary							
250 FCC Expense Adjustment							
260 Lifeline Adjustment							
270 Subtotal							
280 Depreciation/Amortization							
290 Total Expenses							
Other Taxes							
300 State And Local Income	N/A	N/A	N/A	N/A	N/A	N/A	N/A
310 Other State And Local	N/A	N/A	N/A	N/A	N/A	N/A	N/A
320 Total Other Taxes							
FIT							
330 Fixed Charges							
340 IBS Income Adjustment							
350 FCC Taxable Income Adjustment	N/A	N/A	N/A	N/A	N/A	N/A	
360 ITC Amortization	N/A	N/A	N/A	N/A	N/A	N/A	
370 FCC ITC Adjustment	N/A	N/A	N/A	N/A	N/A	N/A	
380 Net FIT							N/A

FILING ENTITY:

T2AC0S-1(P)
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COST ANALYSIS SUMMARY

Classifications	Common Line					Traffic Sensitive				
	Pay Phone	Inside Wire	BFP	CPE	Total	Switching	Equal Access	Transport	Information	Total
	(H)	(I)	(J)	(K)	(L)=H+I+J+K	(M)	(N)	(O)	(P)	(Q)=M+N+O+P
Revenues										
100 Network Access	N/A	N/A	N/A	N/A						
110 Local Network	N/A	N/A	N/A	N/A						
120 Toll Network	N/A	N/A	N/A	N/A						
130 Miscellaneous	N/A	N/A	N/A	N/A						
140 AFUDC	N/A	N/A	N/A	N/A						
150 Uncollectibles	N/A	N/A	N/A	N/A						
170 Common Line Support	N/A	N/A	N/A	N/A		N/A	N/A	N/A	N/A	N/A
171 Long Term	N/A	N/A	N/A	N/A		N/A	N/A	N/A	N/A	N/A
172 Transitional	N/A	N/A	N/A	N/A		N/A	N/A	N/A	N/A	N/A
178 Net Revenues	N/A	N/A	N/A	N/A						
Expenses										
180 Plant Specific										
190 Plant Non-specific Less Depr.										
200 Marketing										
210 Customer Operations Services										
220 Access										
230 Corporate Operations										
240 Extraordinary										
250 FCC Expense Adjustment										
260 Lifeline Adjustment										
270 Subtotal										
280 Depreciation/Amortization										
290 Total Expenses										
Other Taxes										
300 State And Local Income										
310 Other State And Local										
320 Total Other Taxes										
FIT										
330 Fixed Charges										
340 IBS Income Adjustment										
350 FCC Taxable Income Adjustment										
360 ITC Amortization										
370 FCC ITC Adjustment										
380 Net FIT										

FILING ENTITY:

COST ANALYSIS SUMMARY

TIACOS-1(P)
page 3 of 8

Classifications	Special Access (A)	Total Access (B)=L+M+N	Billing & Collection (F)	IX (G)
Revenues				
100 Network Access			N/A	N/A
110 Local Network			N/A	N/A
120 Toll Network			N/A	N/A
130 Miscellaneous			N/A	N/A
140 AFUDC				
150 Uncollectibles			N/A	N/A
170 Common Line Support	N/A		N/A	N/A
171 Long Term	N/A		N/A	N/A
172 Transitional	N/A		N/A	N/A
175 Net Revenues			N/A	N/A
Expenses				
180 Plant Specific				
190 Plant Non-specific Less Depr.				
200 Marketing				
210 Customer Operations Services				
220 Access				
230 Corporate Operations				
240 Extraordinary				
250 FCC Expense Adjustment				
260 Lifeline Adjustment				
270 Subtotal				
280 Depreciation/Amortization				
290 Total Expenses				
Other Taxes				
300 State And Local Income			N/A	N/A
310 Other State And Local				
320 Total Other Taxes			N/A	N/A
FIT				
330 Fixed Charges				
340 IBS Income Adjustment				
360 FCC Taxable Income Adjustment				
360 ITC Amortization				
370 FCC ITC Adjustment				
380 Net FIT			N/A	N/A

FILING ENTITY:

COST ANALYSIS SUMMARY

Classifications	Calendar Year 1988 Total	Annualized 4/1/88 to 12/31/88 Test Period Total	Non-Reg	Other Adjust.	Subject To Separations	State	Interstate
	(A)	(B)	(C)	(D)	(E)=B-C-D	(F)	(G)
Plant-In-service							
380 Support Plant							
400 COE-switching							
410 COE-transmission							
420 Cable And Wire							
430 Information							
440 Amortizable Assets							
460 Total Plant							
Other Investments							
480 Property Held For Future Use							
470 Plant Under Construction							
490 Plant (acquisition) Adjustment							
500 Other Deferred Charges							
600 Material And Supplies							
610 Cash Working Capital							
620 FCC Investment Adjustment							
630 Total Other Investments							
Reserves							
640 Depreciation							
650 Amortization							
660 Deferred FIT							
670 Customer Deposits							
680 FCC Reserve Adjustment							
690 Total Reserves							
Return Rate							
830 Average Net Investment							
850 Net Return	N/A	N/A	N/A	N/A	N/A	N/A	
840 Rate Of Return	N/A	N/A	N/A	N/A	N/A	N/A	N/A
860 FCC Ordered Refund	N/A	N/A	N/A	N/A	N/A	N/A	N/A
880 Net Return Including FCC Refund	N/A	N/A	N/A	N/A	N/A	N/A	N/A
870 Rate Of Return (including Refund)	N/A	N/A	N/A	N/A	N/A	N/A	N/A
888 Universal Service Fund	N/A	N/A	N/A	N/A	N/A	N/A	
889 Lifeline Adjustment	N/A	N/A	N/A	N/A	N/A	N/A	

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FILING ENTITY:

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COST ANALYSIS SUMMARY

	Classifications	Common Line					Traffic Sensitive				
		Pay Phone	Inside Wire	BFP	CPE	Total	Switching	Equal Access	Transport	Information	Total
		(H)	(I)	(J)	(K)	(L)=H+I+J+K	(M)	(N)	(O)	(P)	(Q)=M+N+O+P
	Plant-in-service										
380	Support Plant										
400	COE-switching										
410	COE-transmission										
420	Cable And Wire										
430	Information										
440	Amortizable Assets										
460	Total Plant										
	Other Investments										
480	Property Held For Future Use										
470	Plant Under Construction										
490	Plant (acquisition) Adjustment										
500	Other Deferred Charges										
510	Material And Supplies										
510	Cash Working Capital										
530	FCC Investment Adjustment										
530	Total Other Investments										
	Reserves										
540	Depreciation										
550	Amortization										
560	Deferred FIT										
570	Customer Deposits										
580	FCC Reserve Adjustment										
580	Total Reserves										
	Return Data										
620	Average Net Investment										
630	Net Return										
640	Rate Of Return										
660	FCC Ordered Refund										
660	Net Return Including FCC Refund										
670	Rate Of Return (including Refund)										
680	Universal Service Fund	N/A	N/A	N/A	N/A		N/A	N/A	N/A	N/A	N/A
690	Lifeline Adjustment	N/A	N/A	N/A	N/A		N/A	N/A	N/A	N/A	N/A

FILING ENTITY:

COST ANALYSIS SUMMARY

	Classifications	Special Access (R)	Total Access (S)=L+S+R	Billing & Collection (T)	IX (U)
	Plant-in-service				
300	Support Plant				
400	COE-switching				
410	COE-transmission				
420	Cable And Wire				
430	Information				
440	Amortizable Assets				
450	Total Plant				
	Other Investments				
460	Property Held For Future Use				
470	Plant Under Construction				
480	Plant (acquisition) Adjustment				
490	Other Deferred Charges				
500	Material And Supplies				
510	Cash Working Capital				
520	FCC Investment Adjustment				
530	Total Other Investments				
	Reserves				
540	Depreciation				
550	Amortization				
560	Deferred FIT				
570	Customer Deposits				
580	FCC Reserve Adjustment				
590	Total Reserves				
	Return Data				
610	Average Net Investment			N/A	N/A
630	Net Return			N/A	N/A
640	Rate Of Return			N/A	N/A
650	FCC Ordered Refund			N/A	N/A
660	Net Return Including FCC Refund			N/A	N/A
670	Rate Of Return (Including Refund)			N/A	N/A
680	Universal Service Fund	N/A		N/A	N/A
690	Lifeline Adjustment	N/A		N/A	N/A

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FILING ENTITY:

ADDENDUM
T2AC98-1(P)
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COST ANALYSIS SUMMARY

Classifications	Calendar Year 1998 Total	Annualized 4/1/98 to 12/31/98 Test Period Total	Non-Reg	Other Adjust.	Subject To Separations	State	Interstate
	(A)	(B)	(C)	(D)	(E)=B-C-D	(F)	(G)
Revenues							
100 Network Access	N/A	N/A	N/A	N/A	N/A	N/A	N/A
110 Nonrecurring Charges excl ICBs	N/A	N/A	N/A	N/A	N/A	N/A	N/A
120 Recurring Charges excl ICBs	N/A	N/A	N/A	N/A	N/A	N/A	N/A
130 Individual Case Basis Rates	N/A	N/A	N/A	N/A	N/A	N/A	N/A

FILING ENTITY:

ADDENDUM
T2ACOS-1(P)
page 2 of 3

COST ANALYSIS SUMMARY

Classifications	Common Line					Traffic Sensitive				
	Pay Phone	Inside Wire	BFP	CPE	Total	Switching	Equal Access	Transport	Information	Total
	(N)	(I)	(J)	(K)	(L)=N+I+J+K	(M)	(N)	(O)	(P)	(Q)=M+N+O+P
Revenues										
100 Network Access	N/A	N/A	N/A	N/A						
110 Nonrecurring Charges excl ICBs	N/A	N/A	N/A	N/A						
120 Recurring Charges excl ICBs	N/A	N/A	N/A	N/A						
130 Individual Case Basis Rates	N/A	N/A	N/A	N/A						

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FILING ENTITY:

COST ANALYSIS SUMMARY

ADDENDUM
T2AC01-1(P)
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Classifications	Special Access	Total Access	Billing & Collection	IX
	(R)	(S)=L+Q+R	(T)	(U)
Revenues				
100 Network Access			N/A	N/A
110 Nonrecurring Charges excl ICBs			N/A	N/A
120 Recurring Charges excl ICBs			N/A	N/A
130 Individual Case Basis Rates			N/A	N/A

FILING ENTITY:

PERIOD: 1/88 - 9/88 ANNUALIZED

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COST ANALYSIS SUMMARY

	Classifications	Total	Non-Reg	Other Adjust.	Subject To Separations	State	Interstate
		(A)	(B)	(C)	(D)=A-B-C	(E)	(F)
	Revenues						
100	Network Access						
110	Local Network						
120	Toll Network						
130	Miscellaneous						
140	AFUDC						
150	Unallocatibles						
170	Common Line Support	N/A	N/A	N/A	N/A	N/A	N/A
171	Long Term	N/A	N/A	N/A	N/A	N/A	N/A
172	Transitional	N/A	N/A	N/A	N/A	N/A	N/A
175	Net Revenues						
	Expenses						
180	Plant Specific						
190	Plant Non-specific Less Depr.						
200	Marketing						
210	Customer Operations Services						
220	Access						
230	Corporate Operations						
240	Extraordinary						
260	FCC Expense Adjustment						
260	Lifeline Adjustment						
270	Subtotal						
280	Depreciation/Amortization						
290	Total Expenses						
	Other Taxes						
300	State And Local Income						
310	Other State And Local						
320	Total Other Taxes						
	FIT						
330	Fixed Charges						
340	IBS Income Adjustment						
350	FCC Taxable Income Adjustment						
360	ITC Amortization						
370	FCC ITC Adjustment						
380	Net FIT						

FILING ENTITY:

PERIOD: 1/88 - 9/88 ANNUALIZED

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COST ANALYSIS SUMMARY

Classifications	Common Line					Traffic Sensitive				
	Pay Phone	Inside Wire	BYP	CPE	Total	Switching	Equal Access	Transport	Information	Total
	(G)	(H)	(I)	(J)	(K)=G+H+I+J	(L)	(M)	(N)	(O)	(P)=L+M+N+O
Revenues										
100 Network Access	N/A	N/A	N/A	N/A						
110 Local Network	N/A	N/A	N/A	N/A						
120 Toll Network	N/A	N/A	N/A	N/A						
130 Miscellaneous	N/A	N/A	N/A	N/A						
140 AFUDC	N/A	N/A	N/A	N/A						
150 Uncollectibles	N/A	N/A	N/A	N/A						
170 Common Line Support	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
171 Long Term	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
172 Transitional	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
175 Net Revenues	N/A	N/A	N/A	N/A						
Expenses										
180 Plant Specific										
190 Plant Non-specific Less Depr.										
200 Marketing										
210 Customer Operations Services										
220 Access										
230 Corporate Operations										
240 Extraordinary										
250 FCC Expense Adjustment										
260 Lifeline Adjustment										
270 Subtotal										
280 Depreciation/Amortization										
290 Total Expenses										
Other Taxes										
300 State And Local Income	N/A	N/A	N/A	N/A						
310 Other State And Local										
320 Total Other Taxes	N/A	N/A	N/A	N/A						
FIT										
330 Fixed Charges										
340 IBS Income Adjustment										
350 FCC Taxable Income Adjustment										
360 ITC Amortization										
370 FCC ITC Adjustment										
380 Net FIT	N/A	N/A	N/A	N/A						

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360 Net FIT

FILING ENTITY:

PERIOD: 1/88 - 9/88 ANNUALIZED COST ANALYSIS SUMMARY T2AC03-1(N)

	Classifications	Special Access	Total Access	Billing & Collection	IX
		(Q)	(R)=M+P+Q	(S)	(T)
	Revenues				
100	Network Access				
110	Local Network				
120	Toll Network				
130	Miscellaneous				
140	AFUDC				
150	Uncollectibles				
170	Common Line Support	N/A	N/A	N/A	N/A
171	Long Term	N/A	N/A	N/A	N/A
172	Transitional	N/A	N/A	N/A	N/A
175	Net Revenues				
	Expenses				
180	Plant Specific				
182	Plant Non-specific Less Depr.				
200	Marketing				
210	Customer Operations Services				
220	Access				
230	Corporate Operations				
240	Extraordinary				
260	FCC Expense Adjustment				
265	Lifeline Adjustment				
270	Subtotal				
280	Depreciation/Amortization				
290	Total Expenses				
	Other Taxes				
300	State And Local Income				
310	Other State And Local				
320	Total Other Taxes				
	FIT				
330	Fixed Charges				
340	IBS Income Adjustment				
350	FCC Taxable Income Adjustment				
360	ITC Amortization				
370	FCC ITC Adjustment				
380	Net FIT				

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FILING ENTITY:

PERIOD: 1/03 - 9/03 ANNUALIZED

COST ANALYSIS SUMMARY

Classifications	Total	Non-Reg	Other Adjust.	Subject To Separations	State	Interstate
	(A)	(B)	(C)	(D)=A-B-C	(E)	(F)
Plant-in-service						
390 Support Plant						
400 COE-switching						
410 COE-transmission						
420 Cable And Wire						
430 Information						
440 Amortizable Assets						
450 Total Plant						
Other Investments						
460 Property Held For Future Use						
470 Plant Under Construction						
480 Plant (acquisition) Adjustment						
490 Other Deferred Charges						
500 Material And Supplies						
510 Cash Working Capital						
520 FCC Investment Adjustment						
530 Total Other Investments						
Reserves						
540 Depreciation						
550 Amortization						
560 Deferred FIT						
570 Customer Deposits						
580 FCC Reserve Adjustment						
590 Total Reserves						
Return Data						
610 Average Net Investment						
630 Net Return	N/A	N/A	N/A	N/A	N/A	
640 Rate Of Return	N/A	N/A	N/A	N/A	N/A	N/A
650 FCC Ordered Refund	N/A	N/A	N/A	N/A	N/A	N/A
660 Net Return Including FCC Refund	N/A	N/A	N/A	N/A	N/A	N/A
670 Rate Of Return (including Refund)	N/A	N/A	N/A	N/A	N/A	N/A
680 Universal Service Fund	N/A	N/A	N/A	N/A	N/A	
690 Lifeline Adjustment	N/A	N/A	N/A	N/A	N/A	

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FILING ENTITY:

PERIOD: 1/98 - 9/98 ANNUALIZED

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COST ANALYSIS SUMMARY

Classifications	Common Line					Traffic Sensitive				
	Pay Phone	Inside Wire	BFP	CPE	Total	Switching	Equal Access	Transport	Information	Total
	(G)	(H)	(I)	(J)	(K)=G+H+I+J	(L)	(M)	(N)	(O)	(P)=L+M+N+O
Plant-In-service										
300 Support Plant										
400 COE-switching										
410 COE-transmission										
420 Cable And Wire										
430 Information										
440 Amortizable Assets										
450 Total Plant										
Other Investments										
460 Property Held For Future Use										
470 Plant Under Construction										
480 Plant (acquisition) Adjustment										
490 Other Deferred Charges										
500 Material And Supplies										
510 Cash Working Capital										
520 FCC Investment Adjustment										
530 Total Other Investments										
Reserves										
540 Depreciation										
550 Amortization										
560 Deferred FIT										
570 Customer Deposits										
580 FCC Reserve Adjustment										
590 Total Reserves										
Return Data										
610 Average Net Investment										
630 Net Return	N/A	N/A	N/A	N/A						
640 Rate Of Return	N/A	N/A	N/A	N/A						
660 FCC Ordered Refund	N/A	N/A	N/A	N/A						
660 Net Return Including FCC Refund	N/A	N/A	N/A	N/A						
670 Rate Of Return (including Refund)	N/A	N/A	N/A	N/A						
680 Universal Service Fund	N/A	N/A	N/A	N/A		N/A	N/A	N/A	N/A	N/A
690 Lifeline Adjustment	N/A	N/A	N/A	N/A		N/A	N/A	N/A	N/A	N/A

FILING ENTITY:

COST ANALYSIS SUMMARY

PERIOD: 1/98 - 9/98 ANNUALIZED

	Classifications	Special Access	Total Access	Billing & Collection	IX
		(6)	(8)=K+P+Q	(9)	(7)
	Plant-in-service				
380	Support Plant				
400	COE-switching				
410	COE-transmission				
420	Cable And Wire				
430	Information				
440	Amortizable Assets				
450	Total Plant				
	Other Investments				
460	Property Held For Future Use				
470	Plant Under Construction				
480	Plant (acquisition) Adjustment				
490	Other Deferred Charges				
500	Material And Supplies				
510	Cash Working Capital				
530	FCC Investment Adjustment				
530	Total Other Investments				
	Reserves				
540	Depreciation				
560	Amortization				
580	Deferred FIT				
570	Customer Deposits				
590	FCC Reserve Adjustment				
590	Total Reserves				
	Return Data				
620	Average Net Investment				
630	Net Return				
640	Rate Of Return			N/A	N/A
660	FCC Ordered Refund			N/A	N/A
650	Net Return Including FCC Refund			N/A	N/A
670	Rate Of Return (including Refund)			N/A	N/A
680	Universal Service Fund	N/A		N/A	N/A
690	Lifeline Adjustment	N/A		N/A	N/A

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Filing Entity:

ANALYSIS OF ACCESS ELEMENT COST DATA

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PAGE 1 OF 2

		COMMON LINE	TRAFFIC SENSITIVE		OTHER INTERSTATE	TOTAL INTERSTATE	TOTAL COMPANY (SUBJ TO SEPAR)
			SWITCHED	SPECIAL			
		(A)	(B)	(C)	(D)	(E)	(F)
	ANNUALIZED TEST YEAR FORECAST 4/88 TO 12/88						
	REVENUE REQUIREMENT						
100	Depreciation						
110	Expense Less Depreciation						
120	Taxes Less F.I.T.				N/A	N/A	N/A
130	Net Return				N/A	N/A	N/A
140	F.I.T.				N/A	N/A	N/A
145	Uncoll. Rev.,I.B.C.& Other Rev. Adj.				N/A	N/A	N/A
150	Revenue Requirement				N/A	N/A	N/A
155	Access Service Revenues				N/A	N/A	N/A
	RATE BASE						
160	Telephone Plant In Service						
170	Rate Base Adjustments						
180	Depreciation Reserve						
190	Accum. Deferred Inc. Tax						
200	Net Rate Base						

Filing Entity:

ANALYSIS OF ACCESS ELEMENT COST DATA

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PAGE 3 OF 3

		COMMON LINE	TRAFFIC SENSITIVE		OTHER INTERSTATE	TOTAL INTERSTATE	TOTAL COMPANY (SUBJ TO SEPAR)
			SWITCHED	SPECIAL			
		(A)	(B)	(C)	(D)	(E)	(F)
	ANNUALIZED HISTORICAL PERIOD 1/88 TO 9/88 (1)						
	REVENUE REQUIREMENT						
210	Depreciation						
220	Expense Less Depreciation						N/A
230	Taxes Less F.I.T.						N/A
240	Net Return						N/A
250	F.I.T.						N/A
260	Uncoll. Rev.,I.B.C.& Other Rev. Adj.						N/A
280	Revenue Requirement						N/A
285	Access Service Revenues				N/A	N/A	N/A
	RATE BASE						
270	Telephone Plant In Service						
280	Rate Base Adjustments						
290	Depreciation Reserve						
300	Accum. Deferred Inc. Tax						
310	Net Rate Base						
	TEST YEAR FORECAST 1/88 TO 12/88 (2)						
	REVENUE REQUIREMENT						
400	Depreciation						
410	Expense Less Depreciation						N/A
420	Taxes Less F.I.T.						N/A
430	Net Return						N/A
440	F.I.T.						N/A
445	Uncoll. Rev.,I.B.C.& Other Rev. Adj.						N/A
450	Revenue Requirement						N/A
455	Access Service Revenues						
	RATE BASE						
460	Telephone Plant In Service						
470	Rate Base Adjustments						
480	Depreciation Reserve						
490	Accum. Deferred Inc. Tax						
500	Net Rate Base						

Filing Entity:

ANALYSIS OF ACCESS ELEMENT COST DATA

T2ACOS-2
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		TRAFFIC SENSITIVE				
	COMMON LINE	SWITCHED	SPECIAL	OTHER INTERSTATE	TOTAL INTERSTATE	TOTAL COMPANY (SUBJ TO SEPAR)
	(A)	(B)	(C)	(D)	(E)	(F)
HISTORICAL PERIOD 1/87 TO 12/87 (1)						
REVENUE REQUIREMENT						
610 Depreciation						
620 Expense Less Depreciation						
630 Taxes Less F.I.T.						N/A
640 Net Return						N/A
650 F.I.T.						N/A
655 Uncoll. Rev.,I.B.C.& Other Rev. Adj.						N/A
690 Revenue Requirement						N/A
695 Access Service Revenues				N/A	N/A	N/A
RATE BASE						
670 Telephone Plant In Service						
680 Rate Base Adjustments						
690 Depreciation Reserve						
698 Accum. Deferred Inc. Tax						
610 Net Rate Base						
TEST YEAR FORECAST 1/87 TO 12/87 (2)						
REVENUE REQUIREMENT						
700 Depreciation						
710 Expense Less Depreciation						
720 Taxes Less F.I.T.						N/A
730 Net Return						N/A
740 F.I.T.						N/A
745 Uncoll. Rev.,I.B.C. & Other Rev. Adj.						N/A
780 Revenue Requirement						N/A
785 Access Service Revenues						N/A
RATE BASE						
760 Telephone Plant In Service						
770 Rate Base Adjustments						
780 Depreciation Reserve						
790 Accum. Deferred Inc. Tax						
800 Net Rate Base						

NOTES (1) Actual Operating Statistics
(2) From 1988 TRP T2ACOS-3
(3. From 1988 TRP T2ACOS-3

FILING ENTITY: _____

TIER 2 ANALYSIS OF ACCESS ELEMENT COST DATA

ANNUALIZED TEST YEAR FORECAST 4/88 TO 12/89	COMMON LINE	TRAFFIC SENSITIVE		OTHER INTERSTATE	TOTAL INTERSTATE	TOTAL COMPANY (SUBJ TO SEPAR)
		SWITCHED	SPECIAL			
	(A)	(B)	(C)	(D)	(E)=A+B+C+D	(F)
REVENUE REQUIREMENT						
100 DEPRECIATION						
110 EXPENSE LESS DEPRECIATION						
120 TAXES LESS F.I.T. (1)				N/A	N/A	N/A
130 NET RETURN (1)				N/A	N/A	N/A
140 F.I.T. (1)				N/A	N/A	N/A
145 UNCOLL. REV. + I.D.C. & OTHER REV. ADJ.				N/A	N/A	N/A
150 REVENUE REQUIREMENT (1)				N/A	N/A	N/A
155 ACCESS SERVICE REVENUES				N/A	N/A	N/A
RATE BASE						
160 TELEPHONE PLANT IN SERVCE						
170 RATE BASE ADJUSTMENTS						
180 DEPRECIATION RESERVE						
190 ACCUM. DEFERRED INC. TAX						
200 NET RATE BASE						

TIER 2 COST ANALYSIS TABLE DESCRIPTIONS

T2BCOS-1(H) INTERSTATE ACCESS COST DATA - HISTORICAL

FILING ENTITIES WITH LESS THAN 50,000 ACCESS LINES

GENERAL: THE T2BCOS-1(H) TABLE REFLECTS PART 31 ACCOUNTING RULES AND PART 67 SEPARATIONS RULES. THIS FORM WILL ONLY BE COMPLETED BY THOSE COMPANIES ELECTING TO FILE A HISTORICAL TEST PERIOD OF ANNUAL 1987.

COLUMN	DESCRIPTION
A	TOTAL COMPANY - THESE COSTS ARE EXACTLY WHAT ARE ON THE BOOKS OF THE COMPANY AND INCLUDE ALL REGULATED AND UNREGULATED COMPANY OPERATIONS. THE COSTS REPRESENT THOSE PRIOR TO SEPARATING BETWEEN STATE AND INTERSTATE JURISDICTIONS.
B	ADJUSTMENTS - THESE COSTS ARE REPRESENTED AS THE DIFFERENCE BETWEEN TOTAL COMPANY AND TOTAL COMPANY (SUBJECT TO SEPARATIONS) COSTS. THESE COSTS INCLUDE SUCH COSTS AS THOSE TO PROVIDE SHARED NETWORK FACILITY ARRANGEMENTS. INTRA-COMPANY SUBSIDIARY CONTRACTS, TOTAL COMPANY AMOUNTS OF CPE UNREGULATED BY THE FCC FOR ALL COMPANIES, DEREGULATED OPERATIONS AS APPROPRIATE, ETC.
C	TOTAL COMPANY (SUBJECT TO SEPARATIONS) - THESE COSTS ARE WHAT REMAINS AFTER THE REMOVAL OF UNREGULATED ITEMS (I.E., WHAT ARE THE BOOKS OF THE COMPANY THAT ARE SUBJECT TO JURISDICTIONAL SEPARATIONS).
D	TOTAL INTERSTATE - THE TOTAL INTERSTATE AMOUNT SUBJECT TO PART 67 RULES INCLUDING BILLING AND COLLECTION, CPE PHASE DOWN (COL F) AND OTHER INTERSTATE.
E	TOTAL RATE OF RETURN REGULATED INTERSTATE ACCESS - THIS AMOUNT SHOULD BE THE SAME AMOUNT AS SHOWN IN COL H OF T2ACOS-2(H).
F	TOTAL INTERSTATE ACCESS CPE PHASED-DOWN - THE INTERSTATE ACCESS AMOUNT OF CUSTOMER PREMISES EQUIPMENT FOR THE 13 PHASE-DOWN ACCOUNTS ONLY.
G	INTERSTATE ACCESS NON-CPE - THE AMOUNT OF TOTAL INTERSTATE ACCESS LESS THE CPE PHASED-DOWN AMOUNT (COL E - F).
H	RATIO OF INTERSTATE ACCESS NON-CPE TO TOTAL CO. SUBJECT TO SEPARATIONS. (COL. G/C).
J	OTHER INTERSTATE NON-ACCESS - THE NON RATE OF RETURN REGULATED PORTION OF INTERSTATE WHICH INCLUDES BILLING AND COLLECTION AND INTEREXCHANGE (AIR TO GROUND, MARITIME, COASTAL HARBOR, ETC.) (COL.D-E).
K-Q	THE COLUMN DESCRIPTIONS ARE THE SAME AS T2BCOS-1(P)

TIER 2 DEPRECIATION ANALYSIS TABLE DESCRIPTION

T2BDEP-1A TOTAL COMPANY (SUBJECT TO SEPARATIONS) DEPRECIATION INFORMATION ANALYSIS

FILING ENTITIES WITH LESS THAN 50,000 ACCESS LINES

THESE INSTRUCTIONS APPLY TO THOSE CARRIERS FILING 1989 ANNUAL ACCESS TARIFFS BASED ON A PROSPECTIVE TEST YEAR OF APRIL, 1989 - DECEMBER, 1989 ANNUALIZED. (SEE PAGE 6 AND 8 FOR HISTORICAL TEST PERIOD RULES).

GENERAL: TABLE T2BDEP-1A PROVIDES A SHOWING (BY DEPRECIATION RATE CATEGORY AND ACCOUNT) OF: TOTAL PLANT IN SERVICE ACCOUNT BALANCES AND ADJUSTMENTS FOR THE PERIODS 1/1/88, 9/1/88 4/1/89, 1/1/90; AND DEPRECIATION RATES IN EFFECT FOR THE PERIODS 1/1/88, 1988, AND 1989 AND THEIR EFFECTIVE DATES, AND ANNUAL DEPRECIATION EXPENSE FOR THE PERIODS 1988 AND 1989.

ROW	DESCRIPTION
100 THRU 320	THESE ROWS REPRESENT THE DEPRECIATION RATE CATEGORIES FOR PLANT SUBJECT TO RATES. (EQUIVALENT TO LAST PRESCRIBED IN STATEMENT A)
330 THRU 490	COMPANIES THAT HAVE ACCOUNTS OTHER THAN THOSE SHOWN, SHOULD DISPLAY COMPANY SPECIFIC ACCOUNTS. EXTRA ROWS AND ASSOCIATED COLUMNS SHOULD BE POPULATED WITH ZERO'S (0).
500	SUM OF ROWS 100 - 490
510	THIS ROW REPRESENTS THE PLANT ACCOUNTS WITH AMORTIZATION SCHEDULES OR PLANT NOT SUBJECT TO DEPRECIATION
520	SUM OF ROWS 500 + 510
530	THESE ROWS REPRESENT THE PLANT ADJUSTMENTS REQUIRED TO ARRIVE AT SUBJECT TO SEPARATIONS AMOUNTS
540	TOTAL COMPANY SUBJECT TO SEPARATIONS (520 - 530)
550 (PAGE 2)	COMPOSITE DEPRECIATION RATES EQUAL ANNUAL DEPRECIATION EXPENSE DIVIDED BY PLANT IN SERVICE: 1988 = ROW 540L/ROW 540B 1989 = ROW 540M/ROW 540D

TIER 2 DEPRECIATION ANALYSIS TABLE DESCRIPTION

T2BDEP-1B TOTAL COMPANY (SUBJECT TO SEPARATIONS) DEPRECIATION INFORMATION ANALYSIS

FILING ENTITIES WITH LESS THAN 50,000 ACCESS LINES

THESE INSTRUCTIONS APPLY TO THOSE CARRIERS FILING 1989 ANNUAL ACCESS TARIFFS BASED ON A HISTORICAL TEST YEAR OF JANUARY, 1988 - SEPTEMBER, 1988 ANNUALIZED.

GENERAL: TABLE T2BDEP-1B PROVIDES A SHOWING (BY DEPRECIATION RATE CATEGORY AND ACCOUNT) OF: TOTAL PLANT IN SERVICE ACCOUNT BALANCES AND ADJUSTMENTS FOR THE PERIODS 1/1/87, 1/1/88, 9/1/88; AND DEPRECIATION RATES IN EFFECT FOR THE PERIODS 1/1/87 AND 1988 AND THEIR EFFECTIVE DATES, AND ANNUAL DEPRECIATION EXPENSE FOR THE PERIODS 1987 AND 1988.

ROW	DESCRIPTION
100 THRU 320	THESE ROWS REPRESENT THE DEPRECIATION RATE CATEGORIES FOR PLANT SUBJECT TO RATES. (EQUIVALENT TO LAST PRESCRIBED IN STATEMENT A)
330 THRU 490	COMPANIES THAT HAVE ACCOUNTS OTHER THAN THOSE SHOWN, SHOULD DISPLAY COMPANY SPECIFIC ACCOUNTS. EXTRA ROWS AND ASSOCIATED COLUMNS SHOULD BE POPULATED WITH ZERO'S (0).
500	SUM OF ROWS 100 - 490
510	THIS ROW REPRESENTS THE PLANT ACCOUNTS WITH AMORTIZATION SCHEDULES OR PLANT NOT SUBJECT TO DEPRECIATION
520	SUM OF ROWS 500 + 510
530	THESE ROWS REPRESENT THE PLANT ADJUSTMENTS REQUIRED TO ARRIVE AT SUBJECT TO SEPARATIONS AMOUNTS
540	TOTAL COMPANY SUBJECT TO SEPARATIONS (520 - 530)
550 (PAGE 2)	COMPOSITE DEPRECIATION RATES EQUAL ANNUAL DEPRECIATION EXPENSE DIVIDED BY PLANT IN SERVICE: 1987 = ROW 540K/ROW 540A 1988 = ROW 540L/ROW 540B

TIER 2 DEPRECIATION ANALYSIS TABLE DESCRIPTION

T2BDEP-1C TOTAL COMPANY (SUBJECT TO SEPARATIONS) DEPRECIATION INFORMATION - ANALYSIS

FILING ENTITIES WITH LESS THAN 50,000 ACCESS LINES

THESE INSTRUCTIONS APPLY TO THOSE CARRIERS FILING 1989 ANNUAL ACCESS TARIFFS BASED ON A HISTORICAL TEST YEAR OF ANNUAL 1987.

GENERAL: TABLE T2BDEP-1C PROVIDES A SHOWING (BY DEPRECIATION RATE CATEGORY AND ACCOUNT) OF: TOTAL PLANT IN SERVICE ACCOUNT BALANCES AND ADJUSTMENTS FOR THE PERIODS 1/1/86, 1/1/87, 1/1/88; AND DEPRECIATION RATES IN EFFECT FOR THE PERIODS 1/1/86, 1987 AND THEIR EFFECTIVE DATES, AND ANNUAL DEPRECIATION EXPENSE FOR THE PERIODS 1986 AND 1987.

ROW	DESCRIPTION
100 THRU 320	THESE ROWS REPRESENT THE DEPRECIATION RATE CATEGORIES FOR PLANT SUBJECT TO RATES. (EQUIVALENT TO LAST PRESCRIBED IN STATEMENT A)
330 THRU 490	COMPANIES THAT HAVE ACCOUNTS OTHER THAN THOSE SHOWN, SHOULD DISPLAY COMPANY SPECIFIC ACCOUNTS. EXTRA ROWS AND ASSOCIATED COLUMNS SHOULD BE POPULATED WITH ZERO'S (0).
500	SUM OF ROWS 100 - 490
510	THIS ROW REPRESENTS THE PLANT ACCOUNTS WITH AMORTIZATION SCHEDULES OR PLANT NOT SUBJECT TO DEPRECIATION
520	SUM OF ROWS 500 + 510
530	THESE ROWS REPRESENT THE PLANT ADJUSTMENTS REQUIRED TO ARRIVE AT SUBJECT TO SEPARATIONS AMOUNTS
540	TOTAL COMPANY SUBJECT TO SEPARATIONS (520 - 530)
550 (PAGE 2)	COMPOSITE DEPRECIATION RATES EQUAL ANNUAL DEPRECIATION EXPENSE DIVIDED BY PLANT IN SERVICE: 1986 = ROW 540K/ROW 540A 1987 = ROW 540L/ROW 540B

FILING ENTITY: _____

TIER 2 SPECIAL ACCESS DEMAND COMPARISON

CHANNEL TERMINATION

	HISTORICAL 1/88 - 9/88 (A)	PROSPECTIVE 4/89 - 12/89 (B)
100 METALLIC		
110 TELEGRAPH		
120 VOICE GRADE (EXCL. WATS)		
130 WATS		
140 AUDIO PROGRAM (FULL TIME)		

CIRCUIT AND MILEAGE

	HISTORICAL 1/88 - 9/88		PROSPECTIVE 4/89 - 12/89	
	CKTS (A)	ION (B)	CKTS (C)	ION (D)
150 METALLIC				
160 TELEGRAPH				
170 VOICE GRADE (EXCL. WATS)				
180 WATS				
190 AUDIO PROGRAM (FULL TIME) (EXCL. WATS)				

FILING ENTITY: ANY COMPANY

ANNUALIZED
ACCESS PRICEOUT
COMPARISONS
(DOLLARS IN THOUSANDS)

		Revenue at Effective Rate 1/1/88	Revenue at Effective Rate 12/1/88	Change (B)-(A)	Revenue at Proposed Rate 1/1/89	Change (D)-(B)	Revenue at Proposed Rate 4/1/89	Change (F)-(D)
		(A)	(B)	(C)=B-A	(D)	(E)=D-B	(F)	(G)=F-D
100	Total Multi-Line Business End Usage (incl post 7/83 CTX)							
110	Total Residence and Single-Line Business Usage							
120	Centrex pre 7/83 usage							
130	Total CCL Usage							
140	Total IS-Switched (excl. BA)							
150	Total Special Access Usage							
160	Directory Assistance							

NOTES:

(1) Projected demand quantities for test year 1989 should be uniformly applied to different rate schedules to obtain price-outs.

(2) All non-recurring charges should be included. EA should also be included.

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FILING ENTITY: ANY COMPANY

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PAGE 1 OF 1

ANNUALIZED
ACCESS PRICEOUT
COMPARISONS
(DOLLARS IN THOUSANDS)

		Revenue at Effective Rate 1/1/88	Revenue at Effective Rate 12/1/88	Change (B)-(A)	Revenue at Proposed Rate 1/1/89	Change (D)-(B)	Revenue at Proposed Rate 4/1/89	Change (F)-(B)
		(A)	(B)	(C)=B-A	(D)	(E)=D-B	(F)	(G)=F-B
100	Total Multi-Line Business End Usage (incl post 7/83 CTX)							
110	Total Residence and Single-Line Business Usage							
120	Centrex pre 7/83 usage							
130	Total CCL Usage							
140	Total TS-Switched (excl. BA)							
150	Total Special Access Usage							
160	Directory Assistance							

NOTES:

(1) Projected demand quantities for test year 1989 should be uniformly applied to different rate schedules to obtain price-outs.

(2) All non-recurring charges should be included. EA should also be included.

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RATE ANALYSIS TABLE DESCRIPTIONS

T2RTE-2 ANNUALIZED ACCESS PRICEOUT COMPARISONS

GENERAL: THIS TABLE PROVIDES A SHOWING OF THE REVENUE EFFECT OF PRICING OUT THE PROSPECTIVE TEST YEAR DEMAND AT FOUR DIFFERENT RATE LEVELS (RATES AS OF 1/1/88, RATES AS OF 12/1/88, RATES AS OF 1/1/89 AND PROPOSED RATES FOR 4/1/89).

THIS FORM IS NOT REQUIRED OF TIER 2B COMPANIES WHICH ARE FILING BASED ON A HISTORICAL TEST PERIOD.

COLUMN	DESCRIPTION
A	REVENUES AT EFFECTIVE RATE OF 1/1/88
B	REVENUES AT EFFECTIVE RATE OF 12/1/88
C	CHANGE - COL. B MINUS COL. A
D	REVENUES AT PROPOSED RATES FOR 1/1/89
E	CHANGE - COL. D - COL. B
F	REVENUES AT PROPOSED RATES FOR 4/1/89
G	CHANGE - COL. F MINUS COL. D

ROW	DESCRIPTION
100	TOTAL MULTI-LINE BUSINESS END USAGE (INCLUDING POST 7/83 CENTREX)
110	TOTAL RESIDENCE AND SINGLE-LINE BUSINESS USAGE
120	CENTREX PRE 7/83 USAGE
130	TOTAL CCL USAGE
140	TOTAL TS-SWITCHED (EXCL. DA)
150	TOTAL DIRECTORY ASSISTANCE
160	TOTAL SPECIAL ACCESS USAGE

NOTES

1. PROJECTED DEMAND QUANTITIES FOR TEST YEAR 1989 SHOULD BE UNIFORMLY APPLIED TO DIFFERENT RATE SCHEDULES TO OBTAIN PRICE-OUTS.

2. ALL NONRECURRING MISCELLANEOUS AND ICB CHARGES SHOULD BE INCLUDED. EQUAL ACCESS SHOULD ALSO BE INCLUDED.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
the Application of

SIOUX VALLEY EMPIRE ELECTRIC ASSOCIATION, INC. File No. 50141-CM-P-87

For Authority to Construct and Operate a Multichannel Multipoint Distribution Service station on the F-Group Channels at Colman, SD

MEMORANDUM OPINION AND ORDER

Adopted: December 20, 1988; Released: December 30, 1988

By the Chief, Domestic Facilities Division:

I. INTRODUCTION

1. This case concerns the application filed by Sioux Valley Empire Electric Association, Inc. (The Cooperative), a rural electric cooperative recognized by the U.S. Department of Agriculture, for authority to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the F-group channels at Colman, South Dakota.

II. PLEADINGS

2. *Opposition of Warren Ache.* Warren Ache filed a petition to deny The Cooperative's application. Mr. Ache is an applicant for a previously-proposed MMDS station on the F-group channels for the Sioux Falls, South Dakota area. The distance between Warren Ache's proposed transmitter site and The Cooperative's proposed transmitter site is approximately 30.7 miles. Ache opposes authorization of The Cooperative's MMDS station due to the potential for harmful interference to the operation of his cochannel MMDS station, the potential reduction in the number of subscribers for his proposed MMDS station, and the curtailment of his ability to change the location of his proposed transmitter site.

3. *Opposition of Robert J. Spotts.* Robert J. Spotts filed a petition to deny The Cooperative's application. Prior to the time The Cooperative filed its application, Mr. Spotts filed an application for authority to construct and operate an MMDS station on the F-group channels to serve the Toronto, South Dakota area. The two proposed transmitters were approximately 40.5 miles apart. Mr. Spotts opposed authorization of The Cooperative's proposed MMDS station due to the potential for harmful interference to the operation of his cochannel MMDS station.

4. *Opposition of Edna Cornaggia.* Edna Cornaggia filed an informal objection against The Cooperative's application. Edna Cornaggia is the licensee of MMDS station WLK281 on the E-group channels for Sioux Falls, South Dakota. The distance between the transmitter of station WLK281 and The Cooperative's proposed transmitter location is approximately 30.7 miles. In her informal objection, Mrs. Cornaggia opposed authorization of The Cooperative's proposed MMDS station due to the potential for harmful interference to the operation of her cochannel MMDS station, the potential reduction in the number of subscribers for her proposed MMDS station, and the prejudice to MMDS applicants whose applications would "be placed in a very long processing que behind" The Cooperative's application when the "freeze" on MMDS applications was lifted.

5. *Replies of Applicant.* The Cooperative filed pleadings in response to the oppositions of Robert J. Spotts and Edna Cornaggia. The Cooperative argued that Mr. Spotts had the burden of proof pursuant to Section 309 of the Communications Act of 1934, 47 U.S.C. § 309, of demonstrating that The Cooperative's proposed MMDS station would cause harmful interference to his proposed MMDS station, and argued that Mr. Spotts failed to meet this burden of proof. The Cooperative also asserted that Mrs. Cornaggia lacked standing to oppose its MMDS application and that her arguments lacked merit.

III. COCHANNEL INTERFERENCE PROTECTION

6. As an applicant for a new MMDS station, The Cooperative is required to demonstrate that its proposed station will not cause harmful interference to previously-proposed or authorized cochannel Instructional Television Fixed Service (ITFS) or MMDS stations within 50 miles. The level of interference protection is established by Section 21.902(b)(3) of the Commission's Rules, 47 C.F.R. § 21.902(b)(3), which provides as follows:

> As a condition for use of frequency in this service, each applicant, permittee and licensee is required to: . . . Engineer the system to provide at least 45 dB of cochannel interference protection within the protected service areas of all other authorized or previously proposed stations that transmit, or may transmit, signals for standard television reception. This station engineering must be demonstrated at the time of application pursuant to Section 21.902(c)(1) of the Commission's Rules, 47 C.F.R. § 21.902(c)(1), which provides *inter alia* as follows:
>
> The following interference studies, as appropriate, shall be included with each application: An analysis of the potential for harmful co-channel interference with any authorized or previously proposed station(s), if: (i) The proposed transmitting antenna has an unobstructed electrical path to any part of the protected service area of any other station(s) that utilize(s), or would utilize, the same frequency; or (ii) if the proposed transmitter is within 50 miles of the coordinates of any such station . . . . (*See* §§ 21.701(a), 21.901(a) and 74.902 of this chapter).

7. The Cooperative's application stated that within 50 miles of its proposed transmitter site there were no proposed or authorized ITFS stations on the F-group channels and that there were two proposed MMDS stations on the F-group channels: Warren F. Ache's at Sioux Falls and Richard J. Spotts' at Toronto.[1]

8. The Cooperative's interference analysis concerning Warren Ache's proposed cochannel MMDS station must comply with the requirements at Sections 21.901(c)(1), 21.902(d)(2), 21.902(f)(1) and 21.902(f)(3) of the Commission's Rules, 47 C.F.R. §§ 21.901(c)(1), 21.902(d)(1), 21.902(f)(1) and 21.902(f)(3).[2] *See also Amendment of Parts 21, 74 and 94 of the Commission Rules and Regulations with regard to the technical requirements applicable to the Multipoint Distribution Service, the Instructional Television Fixed Service and the Private Operational - Fixed Microwave Service (OFS)*, 98 FCC 2d 68 (1984) (hereinafter cited as *MMDS Technical Order*).

9. Pursuant to these enumerated rule requirements, we reviewed the The Cooperative's interference analysis was reviewed concerning the potential for harmful cochannel interference from its proposed MMDS station at Colman to Warren Ache's proposed MMDS station at Sioux Falls. The critique of The Cooperative's interference analysis by Warren Ache's consulting engineer, including a statement that harmful interference from The Cooperative's proposed station is anticipated within two miles of Ache's proposed transmitter site, was considered.[3] We are satisfied that The Cooperative has made an adequate demonstration that its proposed station is engineered to provide at least 45 dB of cochannel interference protection within Warren Ache's protected service area. Of course, The Cooperative has an on-going duty to "[c]ooperate fully and in good faith to resolve interference . . . problems" pursuant to Section 21.902(b)(2) of the Commission's Rules, 47 C.F.R. § 21.902(b)(2).

IV. ADJACENT CHANNEL INTERFERENCE PROTECTION

10. Although the technical requirements differ, there are similar requirements imposed on The Cooperative concerning interference protection of adjacent channel ITFS or MMDS stations. As an applicant for a new MMDS station, Sioux Valley must demonstrate that its proposed station will not cause harmful interference to previously-proposed or authorized adjacent channel (E-group or G-group channels) ITFS or MMDS stations pursuant to Sections 21.902(b)(4) and 21.902(c)(2) of the Commission's Rules, 47 C.F.R. §§ 21.902(b)(4) and 21.902(c)(2).[4] Additional requirements[5] are provided at Sections 21.902(d), 21.902(f)(2), and 21.902(f)(3) of the Commission's Rules, 47 C.F.R. §§ 21.902(d), 21.902(f)(2),[6] and 21.902(f)(3). *See also MMDS Technical Order*, 98 FCC 2d 68 (1984).

11. Within 50 miles of The Cooperative's proposed transmitter site, Minnesota Tele-media has an authorized adjacent-channel ITFS station WHR852 on the G-group channels at Marshall, Minnesota and Edna Cornaggia has an authorized adjacent-channel MMDS station WLK281 on the E-group channels at Sioux Falls.[7]

12. Pursuant to these enumerated rule provisions, we reviewed the interference analysis provided by The Cooperative concerning the potential for harmful adjacent channel interference from its proposed MMDS station at Colman to Edna Cornaggia's authorized MMDS station WLK281 at Sioux Falls. We considered Edna Cornaggia's statement that The Cooperative's proposed station would cause harmful interference to the operation of her station at Sioux Falls. We determine that The Cooperative made an adequate demonstration that its proposed station is engineered to provide at least 0 dB of cochannel interference protection within Edna Cornaggia's protected service area. As with cochannel interference problems, The Cooperative would have an on-going duty pursuant to Section 21.902(b)(2) to cooperate fully to resolve any adjacent channel interference problems which may occur.

13. In addition, we reviewed the interference analysis provided by The Cooperative concerning the potential for harmful adjacent channel interference from its proposed MMDS station at Colman to Minnesota Tele-media's authorized ITFS station WHR852 at Marshall. The Cooperative's interference analysis provides calculations which demonstrate at least 10 dB of interference protection to Minnesota Tele-media's twelve constructed receiver sites.[8]

V. MMDS ADMINISTRATIVE MUTUAL - EXCLUSIVITY RULE WAIVER REQUEST

14. For purposes of comparative consideration,[9] applications are classified as either mutually-exclusive or not mutually-exclusive. Pursuant to Section 21.31(a) of the Commission's Rules, 47 C.F.R. § 21.31(a), "[r]adio station construction permit applications are mutually exclusive if 'the grant of one application would effectively preclude by reason of harmful electrical interference, or other practical reason, the grant of one or more of the other applications.'" *National Microwave Interconnect Co.*, 88 FCC 2d 1716, 1721-28 (1982); *see Amendment of Parts 1 and 21 of the Commission's Rules and Regulations applicable to the Domestic Public Radio Services (Other than Maritime Mobile)*, 60 FCC 2d 549, 552-53, 559 (1976). Traditionally, the classification of MDS applications as mutually-exclusive was determined by a review of each of the applicants' interference analyses to determine if there was a potential for harmful electrical interference between any two proposed stations.[10]

15. However, in anticipation of a large number of MMDS applications,[11] the Commission adopted some specific mutual exclusivity rules for MMDS in order to enhance administrative efficiency in processing applications and so as to avoid a "gridlock" situation, with resulting delay in provision of service to the public.[12] One such rule,[13] Section 21.901(d)(5) of the Commission's Rules, 47 C.F.R. § 21.901(d)(5), provides *inter alia*:

> Notwithstanding the provisions of § 21.31(a) all applications that propose to locate transmission facilities within or within 15 miles of the border of a Standard Metropolitan Statistical Area (SMSA) will be considered together. . . .

The Commission described an underlying purpose of this rule as follows:

> . . . 'grid-lock', could be caused by the combination of a large number of applications and the operation of Section 21.31(c) of the rules, 47 C.F.R. § 21.31(c). Grid-lock refers to the situation in which applications proposing to serve widely separated geographical areas are mutually exclusive. For example, if two metropolitan areas, A and B, were separated by 75 miles and several applications were filed for each area, it is unlikely that any of the applications proposing to serve area A would be mutually exclusive with those proposing to serve B. If, however, even one application was filed that

proposed to serve the area located midway between area A and area B, it is likely that it would be mutually exclusive with all the applications proposing to serve area A and all the applications proposing to serve B. This means that all of the applications proposing to serve area A would be in a sense mutually exclusive with those proposing to serve area B. . . . It is not difficult to envision a set of circumstances in which an application that proposed to serve a location in Maine would be mutually exclusive with an application proposing to serve a location in Florida.

We have considered several methods to avoid this result. One of these was to enforce rigorously Section 21.902(a) of the rules, 47 C.F.R. § 21.902(a), that requires all applicants to make "exceptional efforts" to avoid blocking cochannel use in nearby cities. We do not believe that this rule alone is enough to avoid the problem. For this reason, we have decided to limit the applications that *will be considered to be mutually exclusive for purposes of inclusion in* either a comparative hearing or *a lottery* --if we should decide to use such a selection procedure in this service--to *those applicants that propose to locate their transmitters* within a given Standard Metropolitan Statistical Area (SMSA) or *within 15 miles of the boundary of the SMSA* (if the transmitter is not located in another SMSA) or that propose to serve the SMSA. In those situations where the SMSA to be served is a part of a Standard Consolidated Statistical Area (SCSA), it will be considered with all other applications proposing to serve the SCSA.[14] We are requiring applicants proposing to serve any portion of an SMSA to specify what SMSA it intends to serve. In those situations where SMSAs that are not part of SCSAs are either adjacent or so close that a single transmitter could produce a signal strong enough to cause harmful interference in both SMSAs, we require that each applicant not only specify which SMSA it intends to serve but also to detail what steps it will take to prevent blocking cochannel use in the adjacent SMSA. *Issues of mutual exclusivity for applications not proposing to serve SMSAs will be resolved using only existing Part 21 Rules.*

Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, 94 FCC 2d 1203, 1263-64 (1983) (hereinafter cited as *MMDS Allocation Order)* (emphasis added; footnote in original).[15]

16. If service is to be provided to end-users within the Metropolitan Statistical Area (MSA), then administratively the applications are classified as mutually exclusive.[16] *See* Section 21.902(h).[17] The imposition of a requirement that an MMDS station be located more than 15 miles beyond the MSA border was adopted to prevent an MMDS station at the MSA border from providing service to end-users within the MSA, but escape classification as a mutually exclusive application. If the transmitter is to be located more than 15 miles beyond the MSA border, there is little probability that the station will provide service to end-users within the MSA. *See MMDS Technical Order*, 98 FCC 2d 68 (1984). Therefore, if the proposed MMDS station is to be located more than 15 miles beyond the MSA border, mutual exclusivity is determined not pursuant to Section 21.901(d)(5), but by Section 21.31, Section 21.902(h), or some other similar provision. However, if located within 15 miles of the MSA border, it is quite possible for such a station to provide service within the MSA. *Id.* Accordingly, such a station is to be classified as mutually exclusive with all other stations which may provide service within the MSA.

17. The Cooperative's proposed transmitter site is within 15 miles of the border of the Sioux Falls MSA . Thus, pursuant to Section 21.901(d)(5), The Cooperative's application is classified administratively as mutually-exclusive with each of the MMDS station applications proposing to serve the Sioux Falls MSA on the F-group channels.[18] The Cooperative requested a waiver to avoid this result.[19]

18. Such requests for waiver are evaluated pursuant to the guidelines established by the Commission at Section 21.19 of the Commission's Rules, 47 C.F.R. § 21.19, which provides:

> Waivers of these rules may be granted upon application or on the Commission's own motion. A request for waiver shall contain a statement of reasons sufficient to justify a waiver. A waiver will not be granted except upon an affirmative showing that: (a) the underlying purpose of the rule will not be served, or would be frustrated, by its application in the particular case, and the grant of the waiver is otherwise in the public interest; or (b) the unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest. Applicants must also show the lack of a reasonable alternative.

See Wait Radio v. FCC, 418 F.2d 1153 (D.C.Cir. 1969).

19. To justify this waiver request, The Cooperative stated: In this instance, it is unnecessary to consider the subject application together with other MMDS applications for Sioux Falls because Sioux Valley's application does not propose service to the Sioux Falls MSA. The application includes in Exhibit L a showing of substantial unmet public need for the proposed service in an area generally north of the proposed transmitter site which, itself, is nearly 15 miles north of the Minnehaha County line. The proposed service area is therefore not serviceable from the Sioux Falls MSA and should be considered as a separate market area.

20. Edna Cornaggia and Warren Ache oppose grant of this waiver request. Each offers to move their MMDS station transmitters north so as to provide service to the Colman area, as well as Sioux Falls. Mr. Ache argues that only after it is demonstrated that his constructed station fails to provide service to Colman should a waiver of this mutual exclusivity rule be considered. He asserts that Colman and Sioux Falls are not separate markets and that a grant of such a waiver would confer preferential treatment upon The Cooperative. Mrs. Cornaggia argues that the two communities cannot support separate MMDS systems and that The Cooperative failed to meet its burden to demonstrate that a waiver of this administrative mutual

exclusivity rule is justified. "An applicant has a heavy burden to demonstrate that his circumstance is substantially different from those which have been carefully considered in a Rule Making proceeding and, hence, due to a particular hardship the agency should [dispense] with its rules in order to achieve a just and fair result."

21. In considering this waiver request, we note that The Cooperative's station is designed with a directional antenna transmitting in a direction away from the Sioux Falls MSA. Thus, there is little likelihood that the Cooperative will be providing service within the Sioux Falls MSA. This antenna configuation is sufficient demonstration of the steps The Cooperative took and will take to prevent blocking cochannel use within the Sioux Falls MSA. *See MMDS Allocation Order*, 94 FCC 2d at 1264.

22. Also, any administrative inefficiency with regard to a mutual exclusivity determiniation has already occurred. And, due to the distance between the Sioux Falls' transmitters and The Cooperative's transmitter at Colman, endusers located north of Colman are not likely to be provided MMDS from the Sioux Falls' stations. *See MMDS Technical Order*, 98 FCC 2d at 87-121. It is significant that the applicant is a "public" entity, a rural electric cooperative. *See The Baltimore Radio Show, Inc.*, 3 FCC Rcd 169 (Rev. Bd. Jan. 14, 1988)(. . . the justification offered by the *Burke* applicant was merely a private economic reason, and as such, was insufficient to justify a public interest waiver." *Id.* at 170.) Here, because it is a rural electric cooperative, The Cooperative's waiver justification is distinguishable from advancement of a private economic interest which was rejected in *The Baltimore Radio Show, Inc.* Finally, many licensees and tentative selectees in MMDS have been reluctant to make the necessary investment to provide service and have surrendered their authorizations. The vigor with which The Cooperative has pursued an authorization makes it likely that they will bring service to the residents of Colman.

23. We determine that these unique facts and circumstances render application of Section 21.901(d)(5) as contrary to the public interest. We grant a waiver to The Cooperative. However, in order to insure that the underlying purposes of the rule will not be frustrated, and consistent with the representations of The Cooperative, we will impose the following express condition[20] pursuant to Sections 21.901(d)(5) and 21.902(a)[21] upon any license issued to The Cooperative for an MMDS station at Colman:

> This authorization is conditioned on the requirement that the licensee may not provide service, directly or indirectly, nor receive revenue, directly or indirectly, from provision of service to any receiver sites within the Sioux Falls Metropolitan Statistical Area.

VI. FILING PERIOD WAIVER REQUEST

24. Section 21.901(d)(4) of the Commission's Rules, 47 C.F.R. § 21.901(d)(4), provides: "Notwithstanding the provisions of § 21.31 of this part, applications for frequencies in this band will be accepted only on the date(s) specified by the Commission." The Cooperative's application was not filed on a date specified by the Commission. The applicant requested waiver of this rule. In support of this request, The Cooperative argued that "serious and highly qualified companies, such as Applicant," who failed to apply on the dates specified by the Commission are now willing to provide service to rural areas, and that in order to encourage the construction of MMDS stations in rural areas, this filing requirement should be waived.

25. Warren Ache and Edna Cornaggia both opposed grant of a waiver of this rule. In this regard, Mr. Ache's Petition to Deny stated that "there are many areas, both rural and urban, in the United States that are not going to be served by the first round of selectees and to allow [The Cooperative] to be given an exception will in effect open up the rest of the United States to those who are just waiting for an opportunity to file for other areas. . . . If this is allowed to happen, the Commission will be inundated with applications."

26. Mrs. Cornaggia argued specifically with regard to a waiver of this rule:

> Since the Commission's inception it has found it in the public interest to periodically freeze frequencies from further application. At least a half of dozen such freezes have been imposed in the last 30 years. It would be rare if not unprecedented for the Commission to waive a freeze in order to accept a single applicant only for the reason that the proposed service area is unserved. Since such an argument is applicable to each and every license issued by the Commission. The applicant has not cited a single case to justify a waiver of the MMDS application freeze. . . . [there] would be little justification for accepting this application to the prejudice of others who would presumably be placed in a very long processing que behind this pending application.

27. Section 21.19 is the applicable standard for determining whether we should grant this waiver request by The Cooperative. Although The Cooperative's application was not filed during a specified MMDS filing period, subsequently a new filing period was specified by public notice. *Public Notice, MMDS Filing Period*, 3 FCC Rcd 2661 (April 20, 1988). Significantly, if filed today, the Cooperative's application would comply with Section 21.902(d)(4), because it would be filed during a specified filing period. Therefore, we grant a waiver of this rule.

VII. INTERFERENCE TO THE COOPERATIVE'S SERVICE AREA

28. Warren Ache also argues that authorization of The Cooperative's MMDS station application would be contrary to the public interest because his proposed Sioux Falls MMDS station would inflict harmful interference to approximately 80% of The Cooperative's depicted service area at Colman. Pursuant to Section 21.902(e) of the Commission's Rules, 47 C.F.R. § 21.902(e),[22] The Cooperative's station is afforded no interference protection from Mr. Ache's previously-proposed MMDS station at Sioux Falls, or from Edna Cornaggia's authorized MMDS station at Sioux Falls.

29. However, none of our rules specify a minimum service area for an MMDS station. "There is no statute or regulation that sets a minimum size that a licensee's service area must be. Quite to the contrary, the Commission's rules and policies tend to restrict the [maximum] size of MDS station's service contours and thereby encourage greater co-channel compatibility and multiplicity

of ownership and control of licensees. *See RadioCall Corp.*, 77 FCC 2d 30 (1980), *recon. denied*, 85 FCC 2d 596 (1981)." *Stockton Mobilephone, Inc.*, Mimeo No. 6318 (Comm. Carr. Bur. Aug. 13, 1986). Thus, even if its service area is reduced in size to 20% of the area depicted in its application, this is a matter of The Cooperative's independent business judgment as to whether it wishes to construct and operate the MMDS station at Colman as proposed.

VIII. CHANGE OF LOCATION RESTRICTION

30. Warren Ache also complains that The Cooperative's proposed station restricts his ability to amend his application in order to change location. "If the Colman station is built any move from the present Sioux Falls location will require extensive interference analyses and I am certain that [The Cooperative] will [vehemently] oppose any proposed moves because these are not [separate] markets."

31. Pursuant to Section 21.31(e) of the Commission's Rules, 47 C.F.R. § 21.31(e),[23] in order to amend his application to propose a change in the transmitter location, Warren Ache must demonstrate that his move would not create increased levels of interference to The Cooperative's station at Colman, located approximately 30 miles from Mr. Ache's present transmitter site. We recognize that there is little likelihood that Warren Ache would be able to demonstrate that a change of his transmitter site to a location nearer to Colman would not result in increased frequency conflict due to The Cooperative's proposed station at Colman.

32. However, Mr. Ache has had the opportunity since July 28, 1986, the date of the Sioux Falls lottery, to request such an application amendment. Mr. Ache failed to submit such an amendment until recently. He cites no authority to support the contention that he may fail to act for about 28 months, and then, use his own inaction to require denial of The Cooperative's application. Therefore, we reject his argument. We find that Mr. Ache has not demonstrated that denial of The Cooperative's MMDS application is warranted.

IX. CONCLUSION

33. Accordingly, IT IS ORDERED that the Petitions to Deny filed by Warren Ache and Robert J. Spotts ARE DENIED. IT IS FURTHER ORDERED that any conditional license issued to The Cooperative in the future will contain the following express condition:

> This authorization is conditioned on the requirement that the licensee may not provide service, directly or indirectly, nor receive revenue, directly or indirectly, from provision of service to any receiver sites within the Sioux Falls Metropolitan Statistical Area.

34. This order is issued pursuant to Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective on its release date. Petitions for reconsideration pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, or applications for review pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* Section 1.4 of the Commission's Rules, 47 C.F.R. § 1.4.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] At the time The Cooperative filed its application it was required to demonstrate that its proposed MMDS station was engineered for 45 dB of interference protection to Mr. Spotts' proposed cochannel MMDS station at Toronto pursuant to 47 C.F.R. §§ 21.902(b)(3) and 21.902(c)(1). Subsequently, at the request of Mr. Spotts, his Toronto MMDS application was dismissed. Therefore, we need not consider the interference analysis provided by The Cooperative with regard to Mr. Spotts' previously-proposed MMDS station at Toronto.

[2] Section 21.902(d)(2) provides the equation for determining the 710 square mile protected service area for a station using a transmitting antenna which does not have an omnidirectional horizontal plan radiation pattern.

Section 21.902(f)(1) provides:

> In addressing potential harmful interference in this service the following definitions shall be used: Co-channel interference is defined as the ratio of the desired signal to the undesired signal present in the desired channel, at the output of a reference receiving antenna oriented to receive the maximum desired signal. Harmful interference will be considered present when a free space calculation determines that this ratio is less than 45 dB.

Section 21.902(f)(3) provides:

> For purposes of this section all interference calculations involving receive antenna performance shall use the reference antenna characteristics shown in figure 1.

[3] This critique fails to establish the size of the Sioux Falls protected service area; fails to provide the technical parameters (transmitter power, line loss, antenna gain, polarization, etc.) for each station; and fails to describe the methodology used.

[4] Section 21.902(b)(4) provides:

> As a condition for use of frequency in this service, each applicant, permittee and licensee is required to: . . . Engineer the station for adjacent channel operation and, if transmissions are to be provided for standard television reception, insure that, whenever possible, the ratio of the signal transmitted to the signal of any authorized, or previously proposed, adjacent channel station is less than 0 dB when measured at the output of a standard antenna located anywhere within the protected service area of the adjacent channel station and oriented to receive the maximum possible adjacent channel signal.

Section 21.902(c)(2) provides:

> The following interference studies, as appropriate, shall be included with each application: . . . An analysis of the potential for harmful interference with any authorized or previously proposed station(s), if the proposed transmitting antenna has an unobstructed electrical path to any part of the protected service area of any other station(s) that utilizes, or would utilize, an adjacent channel frequency (see §§ 21.701(a), 21.901(a) and 74.902 of this chapter).

[5] In addition to these cited rule provisions, The Cooperative must comply also with two specific interference protection requirements for Minnesota Tele-media's ITFS station: Sections 21.901(d)(1) and 21.902(i) of the Commission's Rules, 47 C.F.R. §§ 21.901(d)(1) and 21.902(i).

[6] Section 21.902(f)(2) provides:

> In addressing potential harmful interference in this service the following definitions shall be used: . . . Adjacent interference is defined as the ratio of the desired signal to undesired signal present in an adjacent channel, at the output of a reference receiving antenna oriented to receive the maximum desired signal level. Harmful interference will be considered present when a free space calculation determines that this ratio is less than 0 dB except that in cases between MDS stations and Instructional Television Fixed Service stations constructed before May 26, 1983 the ratio shall be less than 10 dB.

[7] Sioux Valley's application stated that within 50 miles of its proposed transmitter site, Multichannel Distribution of America had previously proposed an adjacent channel MMDS station at Brookings, South Dakota. Therefore, at the time Sioux Valley filed its application it was required to demonstrate that its proposed MMDS station was engineered for 0 dB of interference protection to this Brookings station pursuant to 47 C.F.R. §§ 21.902(b)(4) and 21.902(c)(2). However, subsequently, this Brookings MMDS application was dismissed pursuant to Section 21.28(d) of the Commission's Rules, 47 C.F.R. § 21.28(d). Thus, we will not consider the interference analysis provided by Sioux Valley with regard to this MMDS station at Brookings.

[8] Each of these receiver sites was constructed prior to May 26, 1983. Thus, pursuant to 47 C.F.R. § 21.902(f)(2), the ratio of desired signal to undesired signal must be less than 10 dB.

[9] *See* Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945).

[10] Each application is reviewed as to every other application that is potentially mutually-exclusive. For example, if there are 10 applications involved in a mutual-exclusivity determination, 90 interference analyses must be reviewed (10 applicants x 9 interference analyses for each applicant). For a description of this process pursuant to Part 21 of the Commission's Rules, *see* Dama Telecommunications Corp., 1 FCC Rcd 1161 (Comm. Carr. Bur. 1987).

[11] More than 16,500 MMDS applications were filed during the initial filing period.

[12] The Commission emphasized in its MMDS allocation order that one of its fundamental objectives at that time was to make MMDS available to the public as quickly as possible.

[13] Another specific MMDS mutual exclusivity rule is Section 21.902(h) of the Commission's Rules, 47 C.F.R. § 21.902(h).

[14] We intend to use the list of SMSAs and SCSAs to be published by the Office on Management and Budget on June 30, 1983 as our source for SMSA definitions in this service.

[15] We note that pursuant to "existing Part 21 Rules", the Cooperative's application might have been classified as mutually exclusive with the Toronto cochannel MMDS application of Robert J. Spotts. *See* Sections 21.31 and 21.902(h).

[16] By this administrative process, the Commission eliminated the need for the applicant's engineer to prepare an interference analysis as to each potentially mutually-exclusive applicant, and eliminated the need for review of each such analysis by a Commission staff engineer.

[17] Section 21.902(h) provides:

> For purposes of 21.31(a) an MDS application for a facility that would cause harmful electrical interference within the protected service area of any authorized or previously proposed station will be presumed to be mutually exclusive with the application for such authorized or previously proposed station.

[18] Because The Cooperative proposed a station located between Warren Ache's proposed station at Sioux Falls (a distance of approximately 30 miles) and Robert J. Spotts' proposed station at Toronto (a distance of approximately 40 miles), The Cooperative's application created a "grid lock" situation, whereby Spotts' application, The Cooperative's application, and all of the Sioux Falls' F-group applications would be classified as mutually exclusive pursuant to Section 21.31(c). This is one type of situation the Commission sought to prevent by adopting Section 21.901(d)(5).

[19] If a waiver of this rule is not granted, Sioux Valley's application would be dismissed as defective because it was filed after the relevant "cut-off" date. *See* Sections 21.20(b)(7), 21.31(b), 21.33(a), and 21.901(d)(4) of the Commission's Rules, 47 C.F.R. §§ 21.20(b)(7), 21.31(b), 21.33(a), and 21.901(d)(4). It was too late for comparative consideration of The Cooperative's application with the cochannel MMDS applications for Sioux Falls, which were included in a lott on July 28, 1986 *See* 47 C.F.R. §§ 1.1824 and 21.33. It was also too late for comparative consideration of The Cooperative's application with the cochannel MMDS application at Toronto because The Cooperative's application was filed after the relevant "cut-off" date, September 9, 1983. *See* 47 C.F.R. §§ 21.31(b) and 21.901(d)(4).

[20] The Cooperative represented that it "would accept an appropriate condition on its authorization to the effect that interference protection will be afforded to any MMDS licensee for the Sioux Falls MSA, based on such licensee's 1983 application for the station."

[21] Section 21.902(a) of the Commission's Rules provides *inter alia*:

> All applicants, permittees, and licensees shall make exceptional efforts to avoid harmful interference to other users and to avoid blocking potential adjacent channel use in the same city and cochannel use in nearby cities. . . .

In determining mutual exclusivity, Section 21.31(a) presumes "full cooperation in good faith by all applicants or parties to achieve reasonable technical adjustments which would avoid electrical conflict."

[22] Section 21.902(e) provides: No MDS licensee will be protected from harmful interference caused by: (1) Any station with an earlier filing date. (2) Any station that was authorized by July 1984. (3) Any multichannel MDS station whose application was pending on September 9, 1983. Warren Ache's applica-

tion has an earlier filing date than The Cooperative's application. Also, Warren Ache's application was pending on September 9, 1983.

[23] Section 21.31(e) provides:

> For the purposes of this section, any application (whether mutually exclusive or not) will be considered to be a newly filed application if it is amended by a major amendment (as defined by § 21.23), except under any of the following circumstances: . . . (2) The amendment resolves frequency conflicts with authorized stations or other pending applications *but does not create new or increased frequency conflicts* ; . . . (5) The amendment corrects typographical, transcription, or similar clerical errors which are clearly demonstrated to be mistakes by reference to other parts of the application, and whose discovery *does not create new or increase frequency conflicts; or (6) The amendment does not create new or increased frequency conflicts,* and is demonstrably necessitated by events which the applicant could not have reasonably foreseen at the time of filing . . . .

(emphasis added.)

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LONG DISTANCE/USA, INC.,

AMERICAN SHARECOM, INC.,

MID-AMERICA LONG DISTANCE COMPANY,

TELEMARKETING INVESTMENTS, LTD.,

NATIONAL TELECOM OF AUSTIN,

TOTAL-TEL, USA.
Complainants.

v.

THE BELL TELEPHONE COMPANY OF PENNSYLVANIA,	File Nos. E-89-03
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY,	E-89-04
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,	E-89-05
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,	E-89-06
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,	E-89-07
NEW JERSEY BELL TELEPHONE COMPANY	E-89-08
ILLINOIS BELL TELEPHONE COMPANY,	E-89-09
INDIANA BELL TELEPHONE COMPANY,	E-89-10
MICHIGAN BELL TELEPHONE COMPANY,	E-89-11
THE OHIO BELL TELEPHONE COMPANY,	E-89-12
WISCONSIN BELL, INC.,	E-89-13
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	E-89-14
NORTHWESTERN BELL TELEPHONE COMPANY,	E-89-15
PACIFIC NORTHWEST BELL TELEPHONE COMPANY,	E-89-16
BELL TELEPHONE COMPANY OF NEVADA,	E-89-17
THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY,	E-89-18
SOUTH CENTRAL BELL TELEPHONE COMPANY,	E-89-19
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	E-89-20
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	E-89-21
NEW YORK TELEPHONE COMPANY,	E-89-22
SOUTHWESTERN BELL TELEPHONE AND TELEGRAPH COMPANY,	E-88-23
CENTEL CORPORATION,	E-88-24
CINCINNATI BELL, INC.,	E-88-25
CONTEL CORPORATION,	E-88-26
THE DIAMOND STATE TELEPHONE COMPANY,	E-88-27
GTE CORPORATION,	E-88-28
HAWAIIAN TELEPHONE COMPANY,	E-88-29
NATIONAL EXCHANGE CARRIER ASSOCIATION, INC.,	E-88-30
SOUTHERN NEW ENGLAND TELEPHONE COMPANY,	E-88-31
UNITED TELECOMMUNICATIONS, INC.,	E-88-32

Defendants.

ORDER

Adopted: December 20, 1988; Released: December 30, 1988

By the Chief, Enforcement Division, Common Carrier Bureau:

1. The complainants in the above-captioned proceedings have requested an extension of time to respond to various pleadings filed by the defendants. Specifically, the complainants ask to be afforded additional time beyond the Commission's rule requirements to file pleadings responsive to the various Answers, Motions to Dismiss, Motions to Consolidate, Motions to Stay Discovery, and a Cross Complaint submitted in response to the complaint. The complainants seek extensions of time until either January 30, 1989 or 15 days after release of an order by the United States District Court for the District of Columbia in response to a motion for clarification filed on behalf of the complainants on December 13, 1988. The complaint actions were brought before the Commission upon the court's referral under the doctrine of primary jurisdiction.

2. Counsel for the complainants state that an extension of time is necessary to respond to complex arguments and allegations made by the multiple defendants in the instant cases. Counsel contends that the proceedings are unusually complicated in light of the history of the underlying district court case and the specific issues raised by the defendants. We agree that the variety and complexity of the issues presented by the defendants may require additional time for response. However, we are reluctant to grant an open-ended extension of time whose termination would be determined by the action of a court, over which we have no control as to the timing of its decision. We believe that an extension of time until January 30, 1989 should permit the complainants to draft any necessary responsive pleadings without unduly delaying this proceeding.

3. Accordingly, IT IS ORDERED that the complainants' request for extension of time is GRANTED to the extent that they shall have until January 30, 1989 to respond to the Answers, Motions to Dismiss, Motions to Consolidate, Motions to Stay Discovery, and the Cross Complaint filed by the defendants in the above-captioned proceedings, and is otherwise DENIED. This order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

INDIANA BELL TELEPHONE COMPANY — File No. 23712-CD-P-85

and

AMERICAN PAGING, INC. (OF INDIANA) — File No. 20020-CD-P-86

For authority to construct and operate PMS base stations on 158.10 MHz at Linwood and Pendleton, Indiana

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1988; Released: December 30, 1988

By the Chief, Common Carrier Bureau:

BACKGROUND AND CONTENTIONS

1. In *Public Notice*, Mimeo No. 1941, released January 15, 1986, the above-referenced applications of American Paging Inc. (of Indiana) (API) and Indiana Bell Telephone Company (Indiana Bell) were designated as mutually exclusive. On February 25, 1986, API filed a Waiver Motion requesting that the Commission waive the thirty day filing period of Section 22.33(c) of the Rules, and allow API to file a request for comparative hearing ten days late.[1] In *Indiana Bell Telephone Co., (Order)*, Mimeo No. 3429, released March 28, 1986, the Mobile Services Division (MSD) denied API's Waiver Motion and scheduled the applications of API and Indiana Bell for disposition by lottery.[2] The *Order* concluded API had not demonstrated the existence of extraordinary or special circumstances necessary to justify a waiver. [3] On April 28, 1986, API filed a Petition for Reconsideration (Petition) requesting the Bureau to reconsider the *Order*, and to grant API's underlying request for comparative hearing. Responsive pleadings were filed.

2. In its Petition, API emphasizes public interest and policy considerations in support of its comparative hearing request. In API's view, Section 22.33(c) is intended not only to ensure that existing carriers are not foreclosed from establishing competitive systems but also to preserve the use of a comparative hearing where there is a marked disparity between service proposals. Specifically, API states that its proposal to add a third station to its existing base stations in the Indianapolis area would enable it to meet the wide-area service requests of its existing subscribers. The proposed station, API argues, would also enable API to provide extended paging service to three other local carrriers. By contrast, API argues, Indiana Bell proposes to construct a stand alone base station offering limited, higher priced service. Thus, API contends, a grant of its waiver request under these circumstances would be fully consistent with the policy of Section 22.33(c).

3. Furthermore, API argues *Westside Communications of Tampa, Inc.*, Mimeo No. 6815, released September 5, 1985, which was cited in the *Order*, supports their position. In API's view, *Westside Communications* stands for the proposition that where a paging carrier seeks to add a co-channel base station, the "substantial showing" standard of Section 22.33(c) is not applicable.[4] Instead, API argues, in order to qualify for a comparative hearing the applicant need only demonstrate that the proposed co-channel facility is within 40 miles of existing facilites and is necessary to meet consumer demand. API asserts it has made the required showing under the *Westside Communications* rule.

4. In response, Indiana Bell contends that API has not provided the Commission with new facts to justify its reconsideration request. Instead, Indiana Bell asserts, API simply reiterates the same allegations considered and rejected by the Bureau in its *Order*. With regard to API's waiver request, Indiana Bell points out that API has failed to demonstrate that circumstances beyond its control caused its failure to comply with the waiver request deadline. Further, Indiana Bell contends that API's reliance on *Westside Communications, supra*, is misplaced. In *Westside Communications*, Indiana Bell argues, the Bureau granted a timely comparative hearing request by a paging carrier who proposed to add a co-channel station within 40 miles of existing operations. In contrast, API failed to file its request within the required 30 days of the public notice.

5. In its reply, API reiterates that the central point of its reconsideration request is "absent the use of comparative proceeding, the public's interest in receiving low-priced, competitive paging service in the greater Indianapolis area will be seriously harmed" if Indiana Bell continues to dominate the market. Moreover, API argues although a "substantial showing" is not necessary to justify a comparative hearing under the *Westside Communications* decision, where a substantial showing has been made, the Bureau must at least take it into account before it can proceed with the lottery.

DISCUSSION

6. Having reviewed the arguments raised by API in its petition, we deny its requested relief. First, as the MSD correctly stated, and the Commission has repeatedly emphasized, lottery selection among mutually exclusive mobile services applicants is the general rule. It is designed so that all applicants, whether new entrants or existing carriers seeking another frequency, may have their applications processed expeditiously. *Lottery Selection Among Applicants*, 53 Rad. Reg. 2d (P&F) 1401, 1431 (1983). Section 22.33(c) creates an exception under which applicants may receive a comparative hearing in lieu of a lottery. Although, this exception was created for the express purpose of permitting an existing carrier to demonstrate its need for a particular frequency as against the need of a new applicant requesting the same frequency, the countervailing Commission policy is to process applications in a timely fashion so to provide quick, reliable service to the public. Hence, the applicant must comply with the thirty day deadline for filing the comparative hearing request. In order to justify waiver of the time requirements of Section 22.33(c), applicants must comply

with Section 22.19 of the Commission's rules and demonstrate the existence of extraordinary or special circumstances. *See WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). As the MSD stated in the *Order*, extraordinary circumstances are not shown where "an applicant's own problem's caused the delay in its request for a comparative hearing".[5] API's unsupported allegations do not persuade us to waive the strict requirements of the rule.[6] Moreover, API's arguments address the merits of its comparative hearing case rather than the substance of its waiver request. These arguments are irrelevant to its request for waiver of the comparative consideration request deadline.

7. We have reviewed the pleadings and have determined, based on all the facts, arguments and relevant precedent that API has not demonstrated that the MSD *Order* in this proceeding contained any erroneous findings of fact or conclusions of law.

ORDERING CLAUSES

8. WHEREFORE, for the foregoing reasons, the Petition for Reconsideration and the Request for Waiver filed by American Paging Inc. of Indiana, File No. 20020-CD-P/L-1-86, IS DENIED.

9. This order is issued under Section 0.291 of the Commission's rules and is effective on its release date. Applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Section 22.33(c) provides, in its pertinent part, that a mutually exclusive applicant seeking to expand an authorized station by adding one or more transmitter locations, on the same frequency and within 40 miles of existing transmitter locations [Section 22.33(c)(1)], or adding one or more frequencies on the same frequency band at the same frequency location or within 40 miles [Section 22.33(c)(2)], may request that its application and those applications mutually exclusive with it be designated for a comparative hearing under the procedures set forth in Section 22.32 in lieu of being placed in lottery selection. *See, also*, Lottery Selection Among Applicants, 57 Rad. Reg. 2d (P&F) 427, 436-436 (1984). Section 22.33(c) requires the applicant requesting a comparative hearing to file within thirty days of the date of public notice announcing mutual exclusivity. Accordingly, the deadline for API's comparative hearing request was February 17, 1986.

[2] In *Public Notice*, Mimeo No. 3500, released March 31, 1986, Indiana Bell was designated as the tentative selectee, and on April 18, 1986, the Commission issued a construction permit for their facilities.

[3] 47 C.F.R. Section 22.19.

[4] In *Westside Communications*, the Common Carrier Bureau found that "the 'substantial showing' requirement is applicable only to a paging applicant seeking to increase the capacity of its system by the addition of channels in the same frequency band."

[5] API's assertion that participation in settlement negotiations contributed to their delay in filing their reconsideration request is an insufficient justification for waiver.

[6] Similarly, *Westside Communications* does not lend support to API's failure to comply with the filing deadlines imposed by Section 22.33(c). In *Westside Communications*, the comparative hearing request was timely filed. API's request, however, was not timely filed.

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